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SELECTION OF CASES

ON

PRIVATE CORPORATIONS.

BY

JEREMIAH SMITH,

STORY PROFESSOR OF LAW IN HARVARD UNIVERSITY.

SECOND EDITION.

IN TWO VOLUMES.

Vol. I.

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PREFACE TO SECOND EDITION.

This edition differs from the first in the following respects: -

- 1. The order of the topics has been changed.
- 2. Some new topics have been added.
- 3. New cases have been added: not only under new topics, but also under many of the old topics.
- 4. Some cases which were inserted in the former edition have been omitted, and some others have been abridged.

J. S.

April, 1902,

PREFACE TO FIRST EDITION.

When Professor Cumming was preparing his "Cases on Private Corporations," in 1892, the list of cases then in use on that subject at the Harvard Law School was placed at his service, with the understanding that the same list was liable to be used by me, at any time after one year, in preparing a selection of cases on the same subject. Such use has now been made of that list. This explains the similarity between Professor Cumming's book and the present work, in regard to the cases selected on some topics.

JEREMIAH SMITH.

April, 1897.

TABLE OF CONTENTS.

VOLUME I.

TABLE OF SELECTED CASES xi
CHAPTER I.
Definition of Corporation
CHAPTER II. €*:↑
Distinction between Corporation and Stockholder 32 Section I. The Distinction applied Generally
CHAPTER III.
CREATION OF CORPORATION
CHAPTER IV.
Corporations de Facto
CHAPTER V.
Acquisition of Membership—Subscriptions for Stock 212
CHAPTER VI.
PROMOTERS
CHAPTER VII.
Interpretation of Charters

CHAPTER VIII.	D
POWERS USUALLY IMPLIED SECTION I. Power to acquire Property by Purchase SECTION II. Power to acquire Property by Devise. SECTION IV. Power to alienate. Power to mortgage. SECTION V. Power to borrow Money. Power to issue Negotiable Notes Section V. Power to make By-Laws	295 295 301 305 317 327
·	
CHAPTER IX.	
Mode of Contracting and of Appointing Agents	3 28
CHAPTER X.	
DIRECTORS	344 344
Section III. Special Interest of Director,—how affecting Action taken by Board. Dealings between Director and Corporation	358 386
Corporation	000
CHAPTER XI.	
Voting Rights of Stockholders	407
CHAPTER XII.	
Power of Majority of Stockholders	446
CHAPTER XIII.	^
STOCKHOLDER'S RIGHT TO INSPECT CORPORATE RECORDS AND PAPERS	483
CHAPTER XIV.	
STOCKHOLDER'S RIGHT TO BRING SUIT IN REFERENCE TO CORPORATE MANAGEMENT, OR TO PROTECT CORPORATE INTERESTS	494
CHAPTER XV.	
Dividends. Preferred Stock	581
CHAPTER XVI.	
Transfer of Shares	612
CHAPTER XVII.	
FORFEITURE OF CHARTER — HOW ENFORCED. SUIT BY STATE, OR BY CITIZEN, TO RESTRAIN ULTRA VIRES ACTS, OR TO COMPEL PERFORMANCE OF CORPORATE DITTES	607

VOLUME II.

CHAPTER XVIII.

Li	BILITY OF		PORATION FOR TORTS. RIGHT OF A CORPORATION TO	Page 733
			CHAPTER XIX.	
Lia	BILITY OF	Cor	PORATION FOR CRIMES AND CONTEMPTS	7 91
			CHAPTER XX.	
-		-	F7	000
EF:	SECTION	I.	VIRES TRANSACTIONS	806
	a		of the Purpose entertained by the Corporation, or by other Extrinsic Facts	807
	SECTION	II.	Executed Transfers to or from Corporation in Excess of Charter Authority	810
	Section	III.	Ultra Vires Lease. Remedies in Case of Repudiation	
	C	IV.	by either Party before the Expiration of the Term	822
	SECTION		Bequest to Corporation in Excess of Charter Authority	833
	SECTION	v.	Suits for Specific Performance of Contracts which are in Excess of Charter Authority; or for Declara- tions of Trust for Purposes in Excess of Charter	851
	Section	VI.	Authority Ultra Vires Contract remaining wholly Executory on both Sides, or executed only in Part by either Side.	
	Section	VII.	Action for Breach, or for Cancellation Suit by Corporation on an Ultra Vires Contract	855
	<i>a</i>		which has been fully performed on its Part	866
	SECTION '	V111.	Suit against Corporation on an Ultra Vires Contract which has been fully performed on the Plaintiff's Part	877
	SECTION	IX.	Obligation to restore what was received under a	011
			Contract which has subsequently been repudiated on the ground of <i>Ultra Vires</i>	927
	SECTION	X.	Liability of Corporator where there is Crime, Tort, or Ultra Vires Contract on the Part of the Corpora-	
			tion	944
			CHAPTER XXI.	
Rra	HTS AND	Remer	DIES OF CREDITORS AGAINST PROPERTY OF CORPO-	
TAIG	RATION			966
	SECTION	I.	Generally	966
	SECTION	II.	Effect of Dissolution upon respective Rights of Creditors and Stockholders; and upon the Enforcement	
	Section	III.	of Corporate Contracts	978
	220110M	ALA.	solidation, Merger, or Transfer of Assets to another	1006

CHAPTER XXII.

	LGR
Power of Insolvent Corporation to prefer Particular Creditors	16
CHAPTER XXIII.	
CREDITOR'S SUIT TO CORRECT OR RESTRAIN CORPORATE MANAGEMENT. CREDITOR'S SUIT AGAINST DIRECTORS	29
CHAPTER XXIV.	
RIGHT OF CORPORATE CREDITOR TO COMPEL SHAREHOLDER TO PAY THE FULL PAR VALUE OF HIS STOCK. RIGHTS OF SHAREHOLDERS INTER SESE TO COMPEL SUCH PAYMENTS	38
CHAPTER XXV.	
STATUTORY LIABILITY OF STOCKHOLDER TO CREDITOR OF CORPORATION, OVER AND ABOVE STOCKHOLDER'S LIABILITY TO PAY IN FULL THE AMOUNT SUBSCRIBED BY HIM FOR STOCK	87
CHAPTER XXVI.	
Power of Corporation to become a Member of a Copartnership or Trust. Corporation formed for the Purpose of establishing a Monopoly	96
CHAPTER XXVII.	
Power of Corporation to own Shares in another Corporation 115	25
· CHAPTER XXVIII.	
Power of Corporation to purchase its own Shares 113	37
CHAPTER XXIX.	
Modes of Dissolution other than by Forfeiture or by Reserved Legislative Power of Repeal	53
CHAPTER XXX.	
CORPORATE RECEIVERSHIP	57
CHAPTER XXXI.	
Foreign Corporations	02

CHAPTER XXXII.

I roter america	Coxen	OL	PAGE
TEGISTATIAE			240
SECTION	I.	How far Repeal, Change of Charter, or Confiscation	
		is prohibited by the U.S. Constitution, or by State	
		Constitutions	246
SECTION	II.	Extent of Police Power, where Charter does not con-	
		tain any Express Reservation of Power 1	306
SECTION	Ш.	Reserved Power in Legislature to repeal Charter . 1	.331
SECTION	IV.	Reserved Power in Legislature to alter or amend	
		Charter	.363

TABLE OF SELECTED CASES.

								PAGE
Aberdeen R. R. v. Blaikie								386
Ambrose Lake, &c. Co., In re				•				563
American Nat. Bank v. American Wood Paper Co								339
American Union Telegraph Co. v. Union Pacific R. Co.								826
Andover, Trustees of Free Schools in v. Flint								1088
Andrews Bros. Co. v. Youngstown Coke Co								22
Anonymous (12 Modern, 559)								791
Ashbury Railway &c. Co. v. Riche				۰				903
Ashton c. Burbank								451
Ashuelot R. R. v. Elliott								1391
Aspen, &c. Co. v. City of Aspen								126
Atchison, &c. R. R. v. Campbell								1442
Athol Music Hall Co. v. Carey						•		216
								709
Attorney General, Ex parte								999
Atwool v. Merryweather								516
Augusta, Bank of v. Earle								1202
Aurora &c. Society v. Paddock								305
•								
Bacon v. Robertson								995
Bahia & San Francisco R. Co., In re								640
Baltimore, &c. Association v. Alderson								1198
Baltimore, Mayor of v. B. & O. R. R								85
Bank, American Nat. v. American Wood Paper Co								33 9
Bank, California Nat. v. Kennedy								1132
Bank, Continental Nat. v. Eliot Nat. Bank								680
Bank, First Nat. of Deadwood v. Gustin, &c. Mining Co.	٥.							1057
Bank, Monroe Savings v. Rochester								81
Bank, Monument Nat. v. Globe Works								807
Bank, Narragansett v. Atlantic Silk Co								202
Bank, Nassau v. Jones								855
Bank, National, of Jefferson v. Texas, &c. Co								126
Bank, Pacific Nat. v. Eaton								230
Bank, Royal, of Liverpool v. Grand Junction R. & D. C	o.							337
Bank Stockton Savings v. Staples								295
Bank, Union v. Jacobs								321
Bank of Augusta v. Earle								1202
Bank of Columbia v. Patterson								331
								851
Dank or heronican or error	-	-	-	-	-	-	•	

													PAGE
Bank of U. S. v. Dandridge												•	329
Bank of U. S. v. Deveaux													94
Baroness Wenlock v. River Dee Co.													928
Bartholomew v. Derby, &c. Co													470
Bateman v. Mid-Wales R. Co													318
Bates v. Coronado Beach Co													1102
Bath Gas Light Co. v. Claffy													870
Beatty v. N. W. Transportation Co.													437
Beer Co., Boston v. Massachusetts .													1314
Bent v. Priest					·								390
Binghamton Bridge												i	286
Bissell v. Michigan, &c. R. Cos								·					877
Black v. Delaware, &c. Co					•			•		Ĭ.	•		477
Boatman's Ins. & T. Co. v. Able								:			·	Ì	618
Bolander v. Stevens								•	•	Ċ	Ċ	•	9
Booth v. Robinson	•	*	•	•	•	•	•	•	•	•	•	•	1125
Boston Beer Co. v. Massachusetts .						•	•	:	•	•			1314
Boston C. & M. R. R. v. Gilmore								•	•	•	•	٠	970
Boston Glass Manufactory v. Langdon								•	•	•	•	•	1153
v									•		•	•	663
Boston Music Hall Association v. Cory					•						•	•	
Boyce v. Trustees of Towsontown, &c.								•	٠	•	•	٠	210
Boyd v. Am. Carbon Black Co								•	•	•	•	٠	1104
Bradbury v. Boston Canoe Club								٠	•	•	٠	•	317
Bradley v. Reppell	٠	•		•	•	•	٠	•	•	•	•	•	191
Brewer v. Boston Theatre	•	•		•	٠	•	•	•	•	•	٠	٠	514
Bridge, Charles River v. Warren Brid	ge	•		•	٠	٠	٠		•	•	•	•	273
Bridge, The Binghamton	٠.				•	٠	•	•	٠	•	•	•	286
Bridge Co., Chenango v. Binghamton	Bri	dge	Co		•	٠	•	•	٠.	•	•	•	286
Bridge Co., Franklin v. Wood Bridge Co., N. Y. & L. I. v. Smith .					•						•		103
													696
Bright v. Lord													604
Brightman v. Bates													434
Broderip v. Salomon													131
Brooklyn Steam Transit Co. v. City of	Br	ook	lyn										694
Brundred v. Rice													944
Brunswick, &c. Co. v. United &c. Co.													870
Bryant's Pond, &c. Co. v. Felt													219
Buffalo & N. Y. C. R. Co. v. Dudley													1365
Bundy v. Ophir Iron Co													42
Burges & Stock's Case												Ċ	927
Burrill v. Nahant Bank										•		•	353
Burt v. British &c. Association										•	•	•	558
Bushnell v. Consolidated, &c. Co			•		Ů	Ċ		•	•	٠	•	٠	177
Button v. Hoffman					·	Ť	·	•	•	•	•	٠	44
274,000 01 220222002 1 1 1 1 1	•	•	•	•	•	•	•	•	•	•	•	•	44
California Nat. Bank v. Kennedy													1132
Callender v. Painesville, &c. R. R.	•	•	•	•	•	:	•	•	•	•	•	•	
Camden, &c. R. R. v. Mays, &c. R. R.	•	•	• •	•	٠	•	٠	٠	•	•	•	٠	208
Campbell's Case	• •	•		•	•	٠	•	•	•		٠	٠	
Carr v. Iglehart	•	•	•	•	•	•	•	•		•	•		403
Case v. Kellev											•		1087
Dase v. Nellev										_	_		853

TABLE OF SELECTED	CASES.						xiii
							PAGE
Cash Register Co., National v. Leland			•				955
Catlin v. Eagle Bank			•				1016
Central R. R. & Banking Co. v. Smith			•				778 -
Central Transportation Co. v. Pullman Car Co			•	•			269
Chadwick v. Old Colony R. R			•				312
Charles River Bridge v. Warren Bridge			•	•			273
Chenango Bridge Co. v. Binghamton Bridge Co.			•				286
Cheraw & Chester R. Co. v. White			•	•			123
Chestnut Hill &c. Turnpike Co. v. Rutter			•	•			738
Chicago, Burlington & Quincy R. R. v. Iowa			•	•			1316
Chicago City R. R. v. Allerton			•	•			355
Childs v. Bank of State of Missouri			•	٠			747
Cincinnati, &c. Co. v. Hoffmeister			•	•			490
City of Detroit v. Detroit & Howell Plank Road	Co		•			•	1414
Clapp v. Peterson			•	•			1149
Cleveland City Forge Iron Co. v. Taylor, &c. Co.			•				1030
Coit v. Gold Amalgamating Co							1061
Columbia, Bank of v. Patterson							331
Columbus Ins. Co. v. Walsh							1225
Commonwealth v. Bringhurst							407
Commonwealth v. Crompton							620
Commonwealth v. Essex Co							1368
Commonwealth v. Smith							308
Commonwealth v. Union, &c. Ins. Co							698
Compagnie, &c., De Bellegarde, In re							403
Comstock, In re							1226
Continental Nat. Bank v. Eliot Nat. Bank							680
Cook v. City of Burlington							74
Covington Drawbridge Co. v. Shepherd							973
Cumberland Coal Co. v. Sherman							391
Currie's Case							1043
Curtin v. Salmon River Co							394
Dartmouth College, Trustees of v. Woodward .							1246
Davenport v. Dows							523
Davidson College, Trustees of v. Chambers' Exec	cutors						833
Davis v. Old Colony R. R							909
Davis v. Smith Amer. Organ Co							909
Davis v. Stevens							156
Davis v. U. S. Electric, &c. Co					. 11		1167
De Bellegarde, In re Compagnie, &c							
Deaderick v. Bank							1032
Deadwood, First Nat. Bank of v. Gustin, &c. Mir	ning Co					i	1057
Delaware L. & W. R. R. v. Erie R. R						·	1170
Denver Fire Ins. Co. v. McClelland						Ĭ.	912
Detroit, City of v. Detroit & Howell Plank Road	Co.		Ţ.	Ċ		•	1414
Distillery, &c. Feeding Co. v. People			•	:		•	1117
Dodge v. Woolsey				•			498
Dovey v. Corey			•	•			
Dow v. Northern R. R			•	•		70	1412
Downing v. Mt. Washington R. Co	• •		:				
powming v. Mit. Washington M. Co		٠.	•	•	• •	•	262

Dudler a Wentucky High School														446
Dudley v. Kentucky High School . Duncuft v. Albrecht	•	•	•	•	•	•	•	•	•	•	•	a	*	612
Dunphy v. Traveller, &c. Association		•	•	•	•	•	•	•	•	•	•	•	•	529
Dupee v. Boston Water Power Co					•	•	•	•	•	•	•	•	•	1137
Dupee v. Boston water rower Co	•				•	•	•	•	•	•	•	•	•	1373
Durfee v. Old Colony, &c. R. R	•	•	•	•	•	٠	•	•	•	•	•	•	•	1010
Eagle Ins. Co. v. Ohio														1320
East Birmingham Land Co. v. Dennis														626
Eastern Counties R. Co. v. Broom .														749
Edwards v. Standard R. S. Syndicate														1157
Ellerman v. Chicago, &c. R. R														348
Ellis v. Marshall														114
Elyton Land Co. v. Dowdell														466
Empress Engineering Co., In re							Ċ							253
Erie & North-East R. Co. v. Casey .														1334
Erlanger v. New Sombrero, &c. Co.								Ĭ	Ċ	Ċ		·	•	232
Ewing v. Composite Brake Shoe Co.								•	Ċ		•	Ċ	·	1008
Ex parte The Attorney-General	•	:		:	:		•	•	Ċ	•	•	Ċ	Ċ	999
Ex parte Williamson	Ţ.	•	•	•	•	•	•	•	•	•	•	•	•	933
222 parte 11 Illiamson	•	•	•	•	•	•	•	•	•	•	•	•	•	200
Fairfield County Turnpike v. Thorp .														64
Falk v. Curtis Pub. Co					:			•	•	•	•	•	•	799
Farmers' Loan, &c. Co. v. N. Y. & N	r 1R	R	•	•	•	•	•	•	•	•	•	•	•	534
Farrington a Putners	. 10.	I.	•	•	•	•	•	•		•	•	•	•	844
Farrington v. Putnam Fayette Land Co. v. Louisville, &c. R	· P	•	•	•	•	•	•	•	•	•	•	•	•	816
Finnegan v. Noerenberg	v. IV.	•	•	•	•	•	•	•	•	•	•	•	٠	149
First Nat. Bank of Deadwood v. Gus	٠	Pro	7.	[::	:	ċ		•	•	•	•	•	•	1057
First Nat. Dank of Deadwood v. Gus	ш,	oc c	14.	LILL	ıng	C	,.	•	•	•	•	•	٠	838
Fiske, Estate of, In re			•	•	•	•	٠	•	٠	•	•	•	٠	
Fitzwater v. Bank of Seneca							•	•	•	•	•	•	•	521
Ford v. Easthampton, &c. Co					٠		•	٠	٠	•	•	٠	٠	588
Forrest v. Manchester, &c. R. Co.	D		٠	•	•	•	•	•	٠	•	٠	•	٠	552
Fort Madison Lumber Co. v. Batavia						•	•	٠	•	•	•	•	•	673
Fosdick v. Schall	•	٠	•	•	•	٠	٠	٠	•	•	•	٠	•	1194
Foss v. Harbottle	•	•	•	•	٠	٠	•	•	•	•	٠	٠	•	507
Foster v. Commissioners Inland Reve	nue	•	•	٠	٠	•	•	•	•	•	•	•	•	51
Franklin Bridge Co. v. Wood						•	•	•	٠	٠	•	•	٠	103
Free Schools in Andover, Trustees of	v. I	lin	t	٠	•	•	٠	•	•	•	•	•	•	1088
Gallagher v. Germania Brewing Co														48
Gashwiler v. Willis			•	•	•	•	•	•	•	•	•	•	•	344
Gibbons v. Anderson				•	•	•	•	•	•	•	•	•	•	372
Gifford v. Livingston	•	•	•	•	•	•	•	•	•	•	•	•	•	
Goodspeed v. East Haddam Bank .	•	•	•	•	•	•	•	•	•	•	٠	•	•	20
Graham v. Boston H. & E. R. R.	•	•	٠	•	•	•	•	•	•	•	•	•	•	758
Gray v. Coffin	•	•	•	•	•	۰	•	•	•	•	•	•		1220
Great Northern, &c. Coal Co., In re.	•	•	•	•	•	•	٠	•	٠	٠	•	•		1095
Great Southern, &c. Coar Co., 1n re. Great Southern, &c. Hetel Co. v. Jon	•	•	•	٠	•	*	•	•	•	•	•	•	٠	1043
Green v. London General Omnibus C	22	•	•	•	•	•	•	•	•	•	•	•	٠	30
Greenwood a Leather Pro Co	υ.	•	•	٠	•	٠	٠	•	•	•	•	٠	٠	755
Greenwood v. Leather, &c. Co Greenwood v. Union Freight Co	•	•	•	•	٠	•	٠	٠	•	•	•	•		237
Guernsey v Cook	•	•	•	•	•	•	•	•	٠	•	•	•	•	1343

FT 0- M (T) 1 C 351 1 C 7										PAGE
H. & M. Tin and Copper Mining Co., In re	•		•	٠	•	•	•		•	1063
Hanchett v. Blair			•		•		•		•	101
Handley v. Stutz										1 066
Hartford & N. H. R. Co. v. Croswell	•	•	•	٠				•		
Harvey v. Linville Co		•								423
Hawes v. Oakland	٠	•	•	•	•					524
Heard v. Talbot	٠	٠		•	٠					687
Higginson & Dean, In re		•								999
Hollins v. Brierfield, &c. Co		•		•						1159
Horne v. Ivy										328
Hospes v. N. & M. Co.			•	٠						1048
Hotchkiss and Upson Co. v. Union Nat. Bank .	•									670
Hoyt v. Thompson				٠						349
Huddersfield Canal Co. v. Buckley										1079
Hun v. Cary	•									363
Hurd v. City of Elizabeth										1199
Hurd v. New York, &c. Co										1006
Hutchinson v. American Palace Car Co										1172
Hutchinson v. Green										354
In re. [See Re.]										
Indianapolis C. & L. R. R. v. Jones										1011
Indianapolis Furnace Co. v. Herkimer										162
Ireland v. Palestine, &c. Turnpike Co										1091
•										
Janney v. Minneapolis &c. Exposition										401
Jefferson, Nat. Bank of v. Texas Investment Co.										126
Jemison v. Citizens' Saving Bank										858
Jesup v. Illinois Central R. R									·	392
Johnson v. Corser										165
Johnson v. Goodyear Mining Co									·	1323
Johnson v. Kessler										125
Joint Stock Discount Co. v. Brown										1129
Jones v. Aspen, &c. Co								Ċ		151
Jones v. Cincinnati Type Foundry Co										204
Journal Printing Co. v. MacLean										787
Junkins v. Union School District						:	:			400
						Ċ				1426
ousings, opinion of the terms o	•	•	•	•	•	٠	•	•	•	1120
Kelner v. Baxter										244
Killen v. Barnes				:	:	•		•		1036
King, The, v. Westwood	i	:		:	•	•		•	•	I11
Hillig, The, v. Westwood	•	•	•	•	•	•	•	•	•	111
Lancaster v. Amsterdam Improvement Co										1213
Lake Shore, &c. R. Co. v. Prentice	•	•	•	•	•	•	•	•	•	766
Land, &c. Co. v. McIntyre	•			:	:	:	•	•	•	506
Land Grant Railway v. Com'rs of Coffey County	•	:	•	•	•	•	•			1210
Landman v. Entwistle	•	:			•	:	•			
Le Roy v. Globe Ins. Co	•	•	:		:					584
Leazure v. Hillegas	•	•			:					810
Lincoln Shoe Mfg. Co. v. Sheldon	•	•								

T							P	AGE 1
Liverpool Ins. Co. v. Massachusetts	• •	•	•	•	•	•	•	77
London Trust Co. v. Mackenzie			•	•	•	•		14
Long v. Georgia Pacific R. Co		-	•	•	•	•		97
Louisville, &c. R. R. v. Letson		•	•	•	:	•	. 10	
Love Mfg. Co. v. Queen City Mfg. Co		•	•	•	•	•	. 11	
Lowe v. Pioneer Threshing Co	•	•	•	•	•	•	. 11	U
McArthur v. Times Printing Co							2	51
		•	:	•	•	•		68
25 0 1 25 0 1 0		•		•	•	•		61
McCutcheon v. Merz Capsule Co		•		•	•	•		98
McElhenny's Appeal		•	•	•	٠	•		42
		•	•	•	•	•	-	1 2
McGraw, Estate of, In re		•	•	•	•	•		56
		•	•	•	•	•	-	91
McNab v. McNab & Harlin Mfg. Co		•	•	•	•	•		30
	•	•	•	•	•	•		10
Mack v. DeBardeleben Coal & Iron Co	٠.	•	•	•	•	•	. 124	
Madden v. Penn E. L. Co		•	•	•	•	•		66 41
Marshall v. Baltimore & Ohio R. R. Co		•	•	•	•	•		99
	• •	•	•	•	•	•		99
Matthews v. Hoagland		•	•	•	•	•		22 36
Mayor, &c. of Baltimore v. B. & O. R. R.		•	•	•	•	•	-	30 85
Mayor of Norwich v. Norfolk R. Co	• •	•	•	•	•	•		ου 38
Malvin v. Laman Ing. Co.		•	•	•	•	•	. 10'	
Melvin v. Lamar Ins. Co	• •	•	•	•	•	•		14 31
Mercantile Trading Co., In re	• •	•	•	•	•	•		
Mercantile Trust Co. v. M. K. & T. R. R.	• •	•	•	•	•	•		93
Metropolitan, &c. Co. v. Hawkins		•	•	•	•	•	. 110	
3 C		•	•	•	•	•		84
Michigan, Bank of v. Niles	• •	•	•	•	•	•		51
Willens E		•	•	•	٠	•		49
Miller v. Ewer		•	•	٠	•	•	. 123	
7 C 1 C C C C C C C C C C C C C C C C C	٠.	•	•	•	•	•		26
Monroe Savings Bank v. Rochester			•	•	٠	•		18
Montgomery v. Forbes		•	•	٠	٠	٠		81
Monument Nat. Bank v. Globe Works	• •	•	٠	•	٠	•		58
Moore & Handley Hardware Co. v. Towers Hardware	٠, ٠	•	٠	•	•	•		07
Mariantte a University Hardware Co. v. 10wers Hardware	Co	• •	•	•	•	•		56
Morisette v. Howard	• •	•	•	٠	٠	•		06
Morris v. Elyton Land Co	• •	•	•	•	•	•		68
Morrison v. Wilder Gas Co		•	٠	•	•	٠		32
Morville v. Amer. Tract Society		•	•	٠	٠	•		39
Mumma v. Potomae Co	• •	•	•	٠	٠		. 9	78
Narragansett Bank v. Atlantic Silk Co								
Nassau Bank v. Jones	• •		•	٠	•	•		02
National Bank of Jefferson v. Texas Investment Co.		•	•	٠	•	•		55
National Building Society In me		•	•	•	٠	•		26
National Building Society, In re	• •	•	•	٠	•	٠		33
National Home &c. Association v. Home Savings Ban		•	•	•	٠	•		55
Natusch v. Irving	к.	•	**	٠	•	•	. 9	16

TABLE OF SELECTED CASES.	xvii
N. D. II. I D. D OH C. L D. D.	PAGE
New Bedford R. R. v. Old Colony R. R	. 1009
	966
N N 1 0 N II D D C 1 1	. 696
New York & New Haven K. R. v. Schuyler	. 653
Newcomb v. Reed	. 121
Nicoll v. New York & Erie R. R.	. 297
Nims v. Mount Hermon Boys' School	. 773
Norris v. Staps	. 327
Northern Pacific R. R. v. Townsend	. 316
Northern Pacific R. R. v. Washington Territory	. 724
	. 437
Northwestern Union Packet Co. v. Shaw	
Norwich, Mayor of v. Norfolk R. Co	. 338
Oakland R. Co. v. Oakland, Brooklyn, &c. R. Co	. 693
	. 636
O'Herron v. Gray	1400
Ohio, ex rel. v. Neff	. 1428
Ohio & Miss. R. R. v. Wheeler	. 1220
Opinion of the Justices	. 1426
	. 270
Ottumwa Screen Co. v. Stodghill	. 678
Pacific Nat. Bank v. Eaton	. 230
Palmer v. Lawrence	. 128
Panhard, &c., La Société, &c. v. Panhard, &c. Motor Co	. 945
Parker v. Bethel Hotel Co	. 36
Parrott v. Lawrence	. 291
Parsons v. Hayes	. 569
	. 560
	. 1221
	. 502
Peabody v. Flint	. 1126
2 out Boil of Contol at 1 at 1	
2 0 1 4 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	. 441 . 18
People v. Assessors of Watertown	
People v. Globe M. L. I. Co	. 986
2 copie et anument	. 704
People v. Montecito Water Co	
People v. New York Central R. R	. 713
	. 1108
	. 1351
Teople, ex res. Onton Trast Co. s. Constitution	. 68
Perun, Society v. Cleveland	. 183
Philadelphia, &c. B. C. R. Co.'s Appeal	. 975
Philadelphia, &c. B. C. R. Co.'s Appeal	. 753
Phillips v. Providence, &c. Co	. 463
Phoenix Life Assurance Co., In re	. 927
Pittsburgh, &c. R. R. v. Stickley	. 315
Pond v. Framingham & Lowell R. R	. 1029

Doubon u. Cabin						1178
Porter v. Sabin	•	•	•	٠	•	443
Price v. Holcomb	TR	nid.	œ.	٠	•	273
D		Hu	ge	•	•	266
Proprietors of Stourbridge Canal v. Wheeley	•	•	•	•	•	200
Queen v. Birmingham & Gloucester R. R						791
Queen v. Great North of England R. R	•	•	•	•	•	794
Wheen v. Great North of England it. it.	•	•	•	•	•	
R. R., Aberdeen v. Blaikie						386
R. R., Ashuelot v. Elliot	•	•	•	•	•	1391
R. R., Atchison, &c. v. Campbell	•	·		•	•	1442
R. R., Bahia & San Francisco, In re	•	•	•	Ċ	•	640
R. R., Boston C. & M. v. Gilmore	•			•	•	970
R. R., Buffalo, &c. ν . Dudley	•				Ī	1365
R. R., Camden &c. v. Mays, &c. R. R					Ĭ	806
R. R., Central, and Banking Co. v. Smith						778
R. R., Cheraw & Chester v. White						123
R. R., Chicago, Burlington & Quincy v. Iowa					Ī	1316
R. R., Chicago City v. Allerton					Ċ	355
R. R., Delaware L. & W. v. Erie R. R.					·	1170
R. R., Eastern Counties v. Broom					Ĭ	749
R. R., Erie & North-East v. Casey					·	1334
R. R., Hartford & N. H. v. Croswell					i	452
R. R., Indianapolis C. & L. v. Jones						1011
R. R., Lake Shore, &c. v. Prentice						766
R. R., Louisville, &c. v. Letson						97
R. R., Mobile & Ohio v. Nicholas					Ċ	418
R. R., New Bedford v. Old Colony R. R.					Ċ	1009
R. R., New York & New Haven v. Schuyler					Ċ	653
R. R., Northern Pacific v. Townsend					·	316
R. R., Northern Pacific v. Washington Territory						724
R. R., Oakland v. Oakland, Brooklyn, &c. R. Co						693
R. R., Ohio & Miss. v. Wheeler						1220
R. R., Philadelphia, &c. r. Quigley						753
R. R., Philadelphia & B. C., Appeal						975
R. R., Pittsburgh, &c. v. Stickley						315
R. R., St. Louis, &c. v. James						99
R. R., St. Louis, &c. v. Paul						1438
R. R., St. Louis, &c. v. Terre Haute, &c. R. R						829
R. R., Severn & Wye and Severn Bridge, In re						581
R. R., Union Pacific v. Hall					Ī	721
R. R., Union Pacific v. U. S.						1400
R. R., Weatherford v. Granger						255
R. R., Wrexham, In re					•	936
Railway Land Grant v. Com'rs Coffey County					•	1210
Kailway, &c. Co., Ashbury v. Riche.			•	•	•	903
Railway, &c. Co., Oregon v. Oregonian Railway Co.			-			270
Re Ambrose Lake, &c. Co					•	563
Re Bahia & San Francisco R. Co.			-		•	640
Re Compagnie, &c. De Bellegarde				•	•	403
Re Comstock		-	•	•	•	1000

TABLE OF SE	ELECTED	CASES.				xix
Re Empress Engineering Co						PAGE
Re Estate of Fiske	• • •	• •	• • •	• •	•	. 253 . 838
Re Estate of McGraw	• • • •	• •		• •	•	
Re Great Northern, &c. Coal Co	• • •	• • •		• •		. 838 . 104 3
Re H. & M. Tin & Copper Mining Co.	• • • •	• • •				1043
Re Higginson & Dean		• •				999
Re Mercantile Trading Co	• • • •	• • •			•	593 593
Re National Building Society		• •			•	
Re Phonix Life Assurance Co		• •			•	933 927
Re Severn & Wye and Severn Bridge	R Co	• •			•	581
Re Steinway's Petition	16. 00.				•	483
Re Wrexham R. R		• •			•	936
Read v. Frankfort Bank					•	1331
Reg. v. Birmingham & Gloucester R. (• •		• •		791
Reg. v. Great North of England R. Co.		• •	• • •		• •	794
Ray " Westwood		• •			•	
Rex v. Westwood		• •			•	111 336
Rogers & Simmons		• •			• •	1233
Rogers v. Simmons		• •			•	990
Ross v. Ross				• •	•	34
Rouge a Morehents' Not Roule		• •				
Rouse v. Merchants' Nat. Bank Royal Bank of Liverpool v. Grand Jun	ation D	~ D C~				1021
Royal Dank of Liverpool v. Grand Jun	ction K. d	z D. Со.	• •			337
Russell v. Temple		• •				32
Russell v. Wakefield Waterworks Co.						539
Rutherford v. Hill					•	173
St Cl-: C						1004
St. Clair v. Cox						1234
St. Louis, &c. R. Co. v. James						99
St. Louis, &c. R. Co. v. Paul						1438
St. Louis, &c. R. Co. v. Terre Haute, &	cc. K. Co.					829
Sabine Tram Co. v. Bancroft				• •		1106
Sager Mfg. Co. v. Smith						1181
Salomon v. Salomon & Co., Limited						131
Sanford v. McArthur						957
Sawyer v. Hoag		c 0				1038
Schufeldt v. Smith		0		• •		1023
Scovill v. Thayer						1044
Scripture v. Francestown Soapstone Co						665
Seaton v. Grant						555
Seeberger v. McCormick						960
Severn and Wye and Severn Bridge Co	., In re.					581
Seymour v. Spring Association						405
Shayne v. Evening Post Co						981
Shelby County v. Union, &c. Bank .						86
Shepaug Voting Trust Cases						415
Sherman v. Fitch						335
Singer Mfg. Co. v. Heppenheimer .						86
Sinking-Fund Case						1400
Slocum v. Providence, &c. Co						198
Slocum v. Warren						198
Smith v. Hurd						494
MILLION CONTRACTOR OF B B B B B B B B B B B B B B B B B B	•			- 0	- 0	201

															426
Smith v. San Francisco & N. P. R. C					•	•	•	•	•	•	•	•	•	•	169
Snider's Sons Co. v. Troy								•	•		•	•	•	٠	180
Snyder v. Studebaker								•	•	•	•	•	•	•	945
Société Anonyme, &c. v. Panhard, &							•	•	•	•	•	•	•	•	183
Society Perun v. Cleveland						•	•	•	•	•	•	•	•	•	1063
Spargo's Case						•	•	•	•	•	•	•	•	•	358
Spering's Appeal	•	•	•	•	•	•	•	٠	• •	•	•	•	•	•	789
State v. Boogher	•	•	•	•	•	•	•	•	•	•	•	•	•	•	116
State v. Bull	•	•	•	•	•	•	•	•	•	٠	•	•	•	•	994
					•	•	•	•	•	•	•	•	•	•	109
State v. Dawson	•	•	•	•	•	•	•	•	•	•	•	•	•	•	699
State v. Fourth N. H. Turnpike Co.		•	•	•	•	•	•	٠	•	•	٠	•	•	•	1330
State v. L. & W. Turnpike Co.				•	•	•	•	•	•	•	•	•	•		=
State v. Oberlin, &c. Association .					•	•	•	•	•	٠	•	•	•		
State, ex rel. Jackson v. Newman.				•		•	•	•	•	•	٠	•	•		1131
Steacy v. Little Rock, &c. R. Co				٠	•	•	٠	٠	•	•	•	٠	•		1081
Stearns v. Minnesota	•	•	•	•	•	٠	•	•	٠	•	٠	•	•	•	1431
Steinway's Petition, In re	٠	•	٠	٠	•	•	•	•	•	•	•	•	٠	٠	483
Stewart v. Lehigh Valley R. R.			•	•	•	•	•	•	•	٠	•	٠	•	•	397
Stevens v. Rutland, &c. R. Co.			•	•	•	•	•	٠	•	٠	•	•	•	•	455
Stockton Savings Bank v. Staples	•	•	•	•			•	٠	•	•	•	•	*		295
Stokes v. Hoffman House	•	•	*	•			•	•	•	٠	٠	•	٠		1187
Stourbridge Canal Co. v. Wheeley					•	•	•	•	•	•	•	•	•	•	
Stoutimore v. Clark					•	•	•	•	•	•	•	٠	•	٠	206
Stringer's Case	•	•	•	•	•	•	•	•	•	•	•	•	•	•	593
Swentzel v. Penn Bank	•	•	•	•	٠	٠	•	•	•	٠	٠	•	•	•	368
Tele II. de la D. C.															ao=
Taft v. Hartford, &c. R. Co	•		a Late	•	•	•	•	•	•	•	•	•	•	•	607
Telegram Newspaper Co. v. Commo						•	•	•	•	•	•	٠	•	٠	802
Thacher v. Dartmouth Bridge Co.					•	•	•	•	•	•	•	•	•	٠	782
Thomas v. Dakin	•	•	•	•	•	•	•	•	٠	•	٠	•	٠	٠	4
Thomas v. west Jersey R. Co	•	•	•	•	•	•	•	•	•	•	•	•	•	•	822
Thorpe v. Rutland, &c. R. Co	•	•	•	•	•	•	•	•	•	•	٠	•	•	•	1306
Thrasher v. Pike County	•	•	•	•	•	•	•	•	•	٠	•	•	•	•	212
Tisdale v. Harris	•	•	•	*	•		•	•	•	•	٠	•	•	٠	613
Tomkinson v. Southeastern R. Co.	•	•	•	•	•	•		•	٠	•	•	٠	•	•	548
Tomlinson v. Jessup	•	•	•	•	•	•	•	٠	•	•	•	•	•		1363
Trenton Potteries Co. v. Oliphant	•	•	•	•	•	٠	•	٠	•	•	•	٠	٠		1119
Trevor v. Whitworth	·	:	٠.		•	•	٠	•	٠	•	•	•			1140
Trustees of Dartmouth College v. W	00	d w	aro	l	•	. •	•	٠	•	•	•	•	•	•	1246
Trustees of Davidson College v. Cha	mt	er	g' Jt	Exe	cu	tor	3	•	•	٠	٠	•	•	•	833
Trustees of Free Schools in Andover	r v.	E	int		•	•	•	•	٠	•	•	•	•	•	1088
II C D															
U. S., Bank of v. Dandridge	•	•	•	•	•	•	•	•	•	٠	•	•	٠	٠	329
U. S., Bank of v. Deveaux	•	•	•	•	•	٠	•	•	•	•	•	٠	•	•	94
U. S. v. John Kelso Co	•			٠	•	•	•	•	•	•	٠	•	•	٠	796
U. S. v. Wolters	•	•	•	•	٠	•	•	•	٠	•	•	•			91
Union Bank v. Jacobs	•	٠	•	•	•	•	•	٠	•	•	•		•		321
Union M. L. I. Co. v. McMillen .	•	•	•	•	•	•	•	٠	٠	•	•				1225
Union Pacific R. R. v . Hall Union Pacific R. R. v . United States	•	•	•	•	•	•	•	٠	•	•	•	•			721
Union Facine K. K. v. United States	}	•	•	٠	•	•	٠	•	٠	•	•				1400
Union Trust Co., People ex rel. v. Co.	aler	ກລາ	n			_	_								00

TABLE OF SELECTED CASES.	XI
Van Allen a Assessors	AGE
Van Allen v. Assessors	77
Vanderbilt v. Bennett	:12
Vilas v. Milwaukee, &c. R. R	112
Voting Trust Cases, Shepaug	:15
Wällamet, &c. Co. v. Kittridge 6	91
Waring v. Catawba Co	50
	9
Warren v. Davenport Fire Ins. Co	59
Washburn Mill Co. v. Bartlett	374
Washington Ins. Co. v. Price	66
	255
	28
	06
	71
	01
	16
	48
Whittenton Mills v. Upton	96
Williams v. Nall	
Williamson, Ex parte	33
Williamson v. Smoot	
Willoughby v. Chicago Junction, &c. Co	64 2
	214
	559
Wrexham R. R., In re	36
Value and a Dark of Franker I	700
Yarborough v. Bank of England	33
Yeaton v. Bank of Old Dominion	46
Zabriskie v. Hackensack & N. Y. R. Co	
Ziegler v. Lake Street El. Co	3 0

SELECT CASES

ON

PRIVATE CORPORATIONS.

CHAPTER I.

DEFINITION OF CORPORATION.

LIVERPOOL, &c. INSURANCE CO. v. MASSACHUSETTS.

1870. 10 Wallace, U. S. 566.1

Error to the Supreme Court of Massachusetts. Bill in equity by State of Massachusetts to collect a tax, and to restrain company from doing further business till the tax was paid.

One question raised in this case was, whether the above Insurance Company is a corporation within the meaning of the Massachusetts Statute imposing upon each fire, &c. insurance company "incorporated or associated under the laws of any government or State other than one of the United States, a tax of 4 per cent upon all premiums charged or received on contracts made in this Commonwealth for insurance of property." The facts as to the nature of the company are sufficiently stated in the opinion.

The Supreme Court of Massachusetts decided that the company was liable to the tax. 100 Mass. 531 [Oliver v. Liverpool, &c. Ins. Co.].

B. R. Curtis and J. G. Abbott, for insurance company. Charles Allen, Attorney-General of Massachusetts, for State.

MR. JUSTICE MILLER. These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

 $^{^{1}}$ Statement abridged. Arguments and part of opinion omitted. — ED

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit, which are deemed essential to their corporate character.

- 1. It has a distinctive and artificial name by which it can make contracts.
- 2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.
- 3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.
- 4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament, which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half-century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, &c., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legis-

lative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

MR. JUSTICE BRADLEY. Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a

corporation. I think it is one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

Judgment affirmed.

THOMAS v. DAKIN.

1839. 22 Wendell, 9.1

In the Supreme Court of New York. Action brought by plaintiff Thomas as president of Bank of Central New York, an association formed under the General Banking Act of April 18, 1838, to recover several demands alleged to be due to the institution. The declaration alleged the indebtedness to be to the bank, and the promises to have been made to the bank; concluding to the damage of the bank of \$10,000; and, therefore, the said plaintiff, as president of the Bank of Central New York, brings suit, &c.

Demurrer to declaration; assigning, in substance, the following special causes:—

- 1. Plaintiff Thomas has no cause of action.
- 2. No authority exists in law for plaintiff to sue on behalf of the bank, or upon promises made to the bank.
- 3. No association of persons not incorporated are entitled by law to bring an action in the name of their president, but only in their individual names.
- 4. The General Banking Act of 1838, so far as it purports to authorize this suit, is unconstitutional; and also is void because it did not receive the assent of two-thirds of all the members of the legislature.

The Constitution of New York, article 7, section 9, is as follows: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill . . . creating, continuing, altering, or renewing any body politic or corporate."

¹ Statement abridged from facts stated by reporter and from facts stated in the opinions. The arguments are omitted; also the greater part of the opinions.—ED

The provisions of the General Banking Act of 1838 are sufficiently stated in the opinion of Nelson, C. J.

C. P. Kirkland, and S. A. Foote, for plaintiffs.

Ward Hunt, for defendant.

Nelson, C. J. . . . Are these associations corporations? In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term corporation in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been well said by learned expounders that a corporation aggregate is an artificial body of men, composed of divers individuals, the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consists the whole frame and essence of the corporation. The "franchises and liberties," or, in more modern language, and as more strictly applicable to private corporations, the powers and faculties, which are usually specified as creating corporate existence, are: (1. The capacity of perpetual succession: 2. The power to sue and be sued, and to grant and receive in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal; and 5. To make by-laws. These indicia were given by judges and elementary writers at a very early day: since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope and purpose of them at this day will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is no otherwise essential than to afford a place of business; and the right to use a common seal, or to make by-laws, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary, in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act in fulfilment of the objects of the association as a single individual. In this way a legal existence, a body corporate, an artificial being, is constituted; the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in affecting it, the operation is conducted with the simplicity and individuality of a natural

person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensable to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various,—limited or enlarged at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have a perpetual succession under a special name, and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and 3. To receive and enjoy in common, grants of privileges and immunities

We will now endeavor to ascertain with exactness the powers and attributes conferred upon these associations by virtue of the statute. The first fourteen sections (1 to 14) prescribe the duties of the comptroller in furnishing notes for circulation, taking the required securities, The 15th provides that any number of persons may associate to establish offices of discount, deposit, and circulation. The 16th, that they shall make and file a certificate, specifying: 1. The name to be used in the business; 2. The place where the business shall be carried on; 3. The amount of capital stock, and number of shares into which divided; 4. The names of the shareholders; 5. The duration of the association. The 18th confers upon the persons thus associating the most ample powers for carrying on banking operations, together with the right "to exercise such incidental powers as shall be necessary to carry on such business;" also to choose a president, vice-president, cashier, and such other officers and agents as may be necessary. the 21st and 22d sections, contracts, notes, bills, &c., shall be signed by the president and cashier; and all suits, actions, &c., are to be brought in the name of, and also against the president for the time being; and not to abate by his death, resignation, or removal, but to be continued in the name of the successor. 24th section: The association may purchase and hold real estate, &c., the conveyance to be made to the president, or such other officer as shall be designated, who may sell and convey the same free from any claim against shareholders. 19th section: The shares of capital stock to be deemed personal property, transferable on the books of the association; and every person becoming a shareholder by such transfer, shall succeed to all the rights and liabilities of the prior holder. 23d section: No shareholder to be personally liable; and the association is not to be dissolved by the death or insanity of any shareholder.

1. Upon a perusal of these provisions, it will appear that the association acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed,

is made personal property, and the several shares transferable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will hence be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so bound together, so moulded into one, as to constitute but a single body, represented by a common name, or names (the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes, and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, &c., loans money, sues and is sued, &c. is true some portion of the business is conducted in the assumed name, and some in the name of the president for the time being; but this in no manner changes the character of the body. A corporation may have more than one name; it may have one in which to contract, grant, &c., and another in which to sue and be sued; so it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every pur-2 Bacon's Abr. 5; 2 Salk. 451; 2 Id. 237; Ld. Raym. 153, 680. The only material circumstance is, a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation. An artificial being is thus plainly created, capable of receiving all the ample powers and privileges conferred upon the associations, and of managing their diversified concerns in an individual capacity. All business is to be conducted in a common or proper name.

2. This artificial being possesses the powers of perpetual succession. Neither sale of shares or death of shareholders affect it; if one should sell his interest, or die, the purchaser or representative, by operation of law, immediately takes his place. § 19. Nor can the insanity of a member work a dissolution. Id. Officers and agents for conducting the business of the association are secured. In case of vacancy, by death or otherwise, the place may at once be filled. § 18. For the entire duration, therefore, of the association, and which may be without limit, § 16, sub. 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. § 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at once that the associations possess all that are deemed essential, according to the most approved authorities, to constitute a corporate body. They have a capacity: 1. To have perpetual succession under a common name, and in an artificial form; 2. To take and grant property, contract obligations, to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, "to exercise such incidental powers as shall be necessary to carry on such business" (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential in conducting the affairs of the institution.

[After considering other questions, the learned judge concludes as follows:—]

Upon the whole, I am of opinion: 1. That these associations are corporations; 2. That the legislature possesses no power to pass a general law like the one under consideration by a majority bill; and 3. That they may pass it by two-thirds of the members elected.

The plaintiff is therefore entitled to judgment on the demurrer, with leave to amend on the usual terms.

[COWEN, J., gave an elaborate opinion, concurring with Nelson, C. J., on points 1 and 2. As to point 3, he inclined to agree with Nelson, C. J. His opinion concludes as follows:—]

But this branch of the argument need not be pursued; for it was agreed on both sides, at the bar, that we must, on this record, presume the general banking law to have been passed by two-thirds of all the members elected to both houses. We must clearly do so until the fact is denied by plea. The requisite constitutional solemnities in passing an act which has been published in the statute book, must always be presumed to have taken place until the contrary shall be clearly shown. Should the defendant withdraw his demurrer, and plead specially that the law in question did not receive the assent of two-thirds, as required by the Constitution, it will then be in order to pass upon the validity of such an objection.

Being clear that the plaintiff's declaration is sufficient in substance, and that he has technically and aptly set forth his cause of action according to the statute, I think there should be judgment for him with leave to withdraw the demurrer, and plead on payment of costs.

Bronson, J. I concur fully in the opinions expressed by my brethren, that associations formed under the general banking law are corporations, and that the assent of two-thirds of all the members elected to each branch of the legislature was necessary to the passing of the act. But, as at present advised, I cannot concur in the opinion that the legislature has the constitutional power, although two-thirds may assent, to provide by a general law for the creation of an indefinite number of corporations at the pleasure of any persons who may associate for that purpose.

It was conceded on the argument, that the demurrer does not reach the objection that the act was not passed by a two-thirds vote; and I have not, therefore, considered the question whether we can look beyond the statute book. A plea may render it necessary for us to pass upon that question.

Judgment for plaintiff.

WARNER v. BEERS, PRESIDENT OF THE NORTH AMERICAN TRUST AND BANKING CO.

BOLANDER v. STEVENS, PRESIDENT OF THE BANK OF COMMERCE IN NEW YORK.

1840. 23 Wendell, 103.1

In the Court of Errors of the State of New York. Demurrers to declarations, raising substantially the same questions as in *Thomas* v. Dakin, 22 Wendell, 9 [ante, p. 4]. The Supreme Court gave judgment in both cases for the original plaintiffs, Beers and Stevens; referring for reasons to the opinions delivered in *Thomas* v. Dakin. Both causes were removed by writs of error to the Court for the Correction of Errors.

L. Sanford and J. A. Spencer, for plaintiffs in error.

W. C. Noyes and S. A. Foote, for Beers.

W. Kent and D. B. Ogden, for Stevens.

[Opinions, which are reported in full, were delivered by Bradish, President of the Senate, Walworth, Chancellor, Root, Senator, and Verplanck, Senator. "A brief analysis" of these opinions may be found in a prefatory note by the reporter, 23 Wendell, p. 103. Portions of the opinion of Verplanck, Senator, are as follows:—

VERPLANCE, Senator. [The learned Senator dissented from the view of the Supreme Court, that the Court were bound, until the fact is denied by plea, to presume that the General Banking Law was passed by a two-thirds vote. He was of opinion that the Court, in deciding upon the demurrer, should ascertain whether the Act received a two-thirds vote; and that, if it were found that the Act received less than a two-thirds vote, it would then be the duty of the Court to inquire whether the provisions of the Act were such in themselves as to bring the case within the constitutional requirement. After some discussion of other topics, the opinion proceeds as follows]:—

essential meaning? "It is called a body corporate," says Lord Coke, because the persons composing it are made into one body." "It is only in abstracto, and rests only in contemplation of law." 10 R. 50. So again, he says, 1 Inst. 202, 250, "Persons capable of purchasing are of two sorts, — persons natural created of God, and persons created by the policy of man, as persons incorporated into a body politic." If, leaving the quaint scholastic teaching of the father of English law, we come to the clearer and directer sense of our own Marshall, we find the same prevailing idea. "A body corporate is an artificial being, invisible, intangible, existing only in contemplation of law. Being the

¹ Statement abridged. Arguments omitted; also part of opinions. — ED.

creature of law, it possesses only the properties conferred upon it by its charter. Among the most important of these are immortality, and, if the expression may be allowed, individuality." 4 Wh. R. 636; 1 Peters R. 46. Again: "It is precisely what the act of incorporation makes it; derives all its powers from that act, and is capable of execting its faculties only in the manner which that act authorizes." "Within the limits of the properties conferred by its charter, it can," says Blackstone, "do all acts as natural persons may." "In corporations," says Professor Woodeson, "individuals are invested by the law with a political character and personality wholly distinct from their natural capacity." "A corporation," says Kyd on Corporations, 13, "is not a mere capacity, but a political person in which many capacities reside." Thus, then, the essential legal definition that covers the whole ground, and expresses the very essence of the being of a body corporate, is this: "It is an artificial legal person, a succession of individuals, or an aggregate body considered by the law as a single continuous person, limited to one peculiar mode of action, and having power only of the kind and degree prescribed by the law which confers them."/ Such is the established notion of our common law. . . .

So far was this principle of corporate personality carried in our old common law, that reasons were expressly assigned why a corporation could not be excommunicated or punished for crime. "Because it has no soul," said Lord Coke, which, however ludicrously it may now sound, was but saying quaintly, and in the style of that day, what in modern times would be expressed by saying that a corporation, being an artificial and not a moral person, must be incapable of guilt. The very able argument in the celebrated historical case of the charter of London in 1682 went a good deal into these refinements, and it was held on one side that a political person had a mind and reason, according to Lord Chief Justice Hobart, and that its reason was expressed by its by-laws; whilst the attorney-general, whom Bishop Burnet has egregiously wronged in calling him "a hot, dull man," argued most acutely, as well as very learnedly, in support of the capacity of a corporation to incur political, if not moral, guilt and punishment.

All these, it is true, are refinements of technical reasoning, in a taste and fashion of thought which have passed away; but they prove conclusively how strong and undoubted was that legal principle of personality upon which these mere inferences and nice distinctions were founded.

In order to continue the existence of such an artificial verson, perpetual succession is ordinarily necessary, though it was not strictly essential, for it may be confined to any given number of lives in being, holding in a sort of corporate joint tenancy, of which I think examples may be found. As a legal person, it has only the powers and properties specifically conferred upon it; and can possess and exercise no others, except such as are absolutely necessary to the exercise of the powers expressly given. This is the enactment of our revised statutes,

which, as our revisers rightly said in their report on that title of the law, is "declaratory of a principle of law frequently recognized by our courts, and which it was deemed useful to confirm by legislative authority." To these are added certain legal incidents by the common law, also declared in our statute, and common to all corporations, as to sue and be sued, hold and convey real and personal property, to appoint officers for its services, and to make by-laws for the management of its affairs. To these more important rights the law adds the external evidence of a name and a common seal. This last, though apparently a matter of form, is not without effect, any more than the legal consequences of seals to instruments in England and this state, so widely different from those of other legal systems, where the distinction between sealed and unsealed instruments is unknown. It is only through a common seal and name that any grant of lands, or covenant touching them, can be made by a corporation.

There are several very useful and beneficial accessary powers, or attributes very often accompanying corporate privileges, especially in moneyed corporations, which, in the existing state of our law, as modified by statutes, are more prominent in the public eye, and perhaps sometimes in the view of our courts and legislatures, than those which are essential to the being of a corporation. Such added powers, however valuable, are merely accessary. They do not in themselves alone confer a corporate character, and may be enjoyed by unincorporated Such a power is the transferability of shares, whereby investments may be made, without the owner losing the future control of his funds under changes of circumstances. Such, too, is the limited responsibility by which the stockholder, having once fairly paid up his share of the capital, is exempted from further personal liability. too, the convenience of holding real estate for the common purposes, exempt from the legal inconveniences of joint tenancy or tenancy in common. Again: there is the continuance of the joint property for the benefit and preservation of the common fund, indissoluble by the death or legal disability of any partner. Every one of these attributes or powers, though commonly falling within our notions of a moneyed corporation, is quite unessential to the legality of a corporation, may be found where there is no pretence of a body corporate, nor will they make one if all were combined, without the presence of the essential quality of legal individuality. This distinction has been observed and marked by Mr. Kyd, Kyd on Corporations, 13, with logical acuteness and precision: "A corporation is a political person, capable, like a natural person, of enjoying a variety of franchises. It is to a franchise as the substance to its attribute. It is something to which many attributes belong, but it is itself something distinct from those attributes."

Thus, the transferability of shares is not essential to a corporation. For instance, it does not enter into the constitution of our chartered colleges, academies, hospitals, and other corporate institutions founded

by public endowment, or private beneficence. It does not enter into the charters of incorporated scientific and literary societies for mutual benefit or charity, in the funds of which the members have a beneficial interest. On the other hand, such a right of transfer may be incorporated into partnership articles, and become a fundamental condition of them. The general rule, in absence of any express stipulation, is indeed the reverse of this, and in practice it is comparatively rare amongst us. Hence it has become common to consider such transferability as a clear indication of a corporate character.

[After referring to the joint stock companies authorized by statutes in England, the opinion proceeds.] But, on this head of transferability, we need not rely upon English authority in our own usages and decisions.

In the articles of the Merchants' Bank Association, before our restraining act, a similar transferability of shares was provided, and these articles have the authority of Alexander Hamilton for their validity. I shall have occasion to refer to them more fully hereafter.

So again, in the case of the Albany Exchange, before it received its present charter, the validity of the partnership or joint stock company for a public enterprise, with transferable shares, was expressly recognized. By the Court, — Cowen, J. "The objection taken on the argument, that this association was illegal, as being in the nature of a corporation, issuing scrip and providing for a transfer of stock, is not well founded. The act of associating in this way is, we think, properly characterized by the exception taken at the trial. It constitutes a partnership valid, as being formed for the purposes of a lawful, honest enterprise." Townsend v. Goewey, 19 Wendell, 427. The learned judge then refers to and adopts the authority of Collyer on Partnerships, p. 624, and the cases he cites.

Again, this transferability may be found in many sorts of trusts. A well-known instance of this may be seen in the Tontine of New York, originally built for the purposes of a Merchants' Exchange. It is a trust of real estate, with transferable shares as personal property; it was originally settled by the most eminent counsel of this state, and its validity has been attested by nearly fifty years' experience, during which above two hundred shares have passed through courts, assignments, insolvencies, bankrupt commissions, distributions of estates, &c., without their legal transferability having ever been impeached. See printed articles of the Tontine, N. Y., 1793.

In both of these last examples, as in other instances of trusts and partnerships, lands were held exempt by operation of law from the legal incidents of joint tenancy, or tenancy in common, and the estate continued for the common purposes. This has been noted as a mark of corporate character; yet most corporations are limited in the extent of its exercise, some are expressly excluded from the privilege, and very many exist legally without its actual exercise or enjoyment.

The non-dissolution by death or by legal disability is also noted in

the opinion of the supreme court in these cases as a mark of a corporate body. But that also may be found in the trusts just mentioned, and others of a similar nature, and it may be adopted as an article of ordinary partnership. It is the settled law of England that it may be stipulated that death shall not dissolve the partnership, and further, that the executors of the deceased shall become partners. Collyer on Part., p. 5, 648; Pease v. Chamberlain, 2 Vesey R. 33; Haggerman v. Spears, 7 Pick. R. 235; Wrexham v. Huddleton, 1 Swanst. 514.

Again: a common name has been regarded as a corporate criterion. To this Lord Ellenborough gives a full answer in Rex v. Webb. "As to the fourth point, that the subscribers have presumed to act as if they were a body corporate, —how is this made out? It was urged that they assumed a common name, that they have a committee, &c. But are these the unequivocal evidence and characteristics of a corporation? How many unincorporated assurance companies and other descriptions of persons are there that use a common name, and have their committees, general meetings, and by-laws? Are these all illegal? or which of these particulars can be stated as being of itself the distinctive and peculiar criterion of a corporation?" Thence he infers that "these subscribers have not acted peculiarly as a body corporate." Rex v. Webb, 14 East's R. 406.

But perhaps, in the general and popular understanding, the most familiar distinction between corporate bodies and common partnerships, or other joint undertakings, is the exemption of the associates from personal liability beyond the actual amount of their respective proportions of the capital. The regarding this very frequent and important incident of a corporation as an essential characteristic seems not to be confined to popular opinion. Judge Cowen says, in the decision of the cases now before us: "Among other peculiar privileges conferred on these associations, and not enjoyed by natural persons, I allude to that of the exemption of members from personal liability for debt. This is mentioned by Angell & Ames, in their treatise, as peculiar to a private corporation; they notice it as a striking characteristic between a corporation and a partnership." Yet our own statute of limited partnerships affords sufficient evidence that an alteration of the existing law may be made by statute, so as to exempt from personal liability beyond the stipulated share in the joint funds, for the debts of a firm, without the remotest thought of converting such firms into bodies corporate. Besides, the right of making a contract, whereby those who tender it stipulate not to be bound beyond the amount of some specific pledged fund, must be a natural right growing out of the very nature of contracts. If a company or association, or an individual, offers to contract to make certain payments only to the amount of certain specific funds, and others choose to accept that contract on those conditions, there can be nothing to prevent the validity of such a contract, except some positive rule of law founded on policy or an arbitrary enactment. the absence of such a restriction, it is and must be good. Such a limitation, then, must be binding on all who accept the conditions. The policy of our law and the usages of business have, indeed, rightly fixed the presumption the other way, so that the stipulation and the burden of proof of the limited indebtedness are thrown upon those who expect to be benefited by them. This right has been substantially admitted by the highest tribunal in Great Britain, in the case of Minnet v. Whinnery, 3 Brown's Parl. Cas., 323, and it was held to be good by Lord Ellenborough, in Alderson v. Clay, 1 Camp. 404. The doctrine has been received as settled law by one of the best elementary writers of the day, often cited by our own supreme court, "When a creditor," says Collyer on Partnership, 214, "has notice, that by an arrangement between partners, one of them, though appearing to the world as a partner, shall not participate in the loss, and shall not be liable for it, the creditor will be bound by the arrangement."

The original articles of the Merchants' Bank in the city of New York, as an unincorporated association, with limited liability, as well as transferable shares, which were read in argument by Mr. Kent, have the great professional authority of Alexander Hamilton, who prepared them, and of the many eminent men who joined in them, and whose professional distinction gives to their approbation the character of a sort of judicial sanction; whilst the restraining act passed soon after proves, as was unanswerably argued, that the legislature and its legal advisers considered such a voluntary association, thus restraining its own liability, not as a violation of common law, but merely as contradicting the financial policy of the State.

A similar analysis of such of the customary accessary powers of specially chartered moneyed corporations as, from being most conducive to ends of profit or convenience, are ordinarily considered as the essential qualities constituting corporations, will show, that all such powers or incidents are merely convenient and desirable authorities or modes of action, added to and engrafted upon the creation of a body politic; not the legal attributes absolutely essential to a corporation, and denoting its existence as such.

Amongst us, as in England, bodies politic or corporate may exist where the ultimate personal liability is still retained. The personal liability is indeed suspended in such cases, and for a time merged in that of the artificial corporate person; but there may be an ulterior recourse to the corporators when the former fails. Many corporate banks in other states are so constituted, and with us some chartered companies for insurance, &c., some for an indefinite, others to a limited extent beyond the capital. Corporate bodies may exist also without transferability of the rights of the corporators; for a large majority of our literary and charitable, as well as all our municipal corporations, are so. On the other hand, by our own common law as it would exist now, independently of statutory restrictions, associations might be formed and trusts created, having every one of the above enumerated characteristics, which have been insisted upon as essential to a

corporation, except that personality which I before stated as forming its strict and necessary essential legal definition. The present joint-stock companies of England afford pregnant examples, showing how many of these attributes may be embodied in voluntary associations which are confessedly not corporations.

In fact the line may be very faint, and depending wholly upon the purely legal and technical character conferred, whether a joint stock association or a trust, freed by law from certain positive restraints imposed by our modern statutes, be a corporation or not. The Tontine trust, before mentioned, is managed by directors annually elected by stockholders; its real estate is held by trustees, continuing their trust from hand to hand during the lives of the original nominees and the survivors of them, with transferable shares, and wholly without personal liability. For the reasons already stated, the eminence of the counsel (the late R. Harrison) who prepared the trust, and the frequency with which its legal character must have passed in review before lawyers and courts, and always without objection, it may well be regarded as sanctioned judicially. It is a valid trust. Add to it a legislative charter, making the associates a body corporate and no more, what then is the effect? Simply to give a different technical character, an artificial individuality, in Chief Justice Marshall's phrase, a different mode of standing in courts.

Such was the actual history of the Albany Exchange. It was a joint stock company, formally decided to be valid. 19 Wendell's R. 427. A year or two after (1837) it appears by our statute book to have been incorporated. But there is probably but little difference, besides the greater convenience of the corporate body, between the former organization and the present.

The trusts specially permitted by an act of last year, Statutes of 1839, chap. 174, for the benefit of that singular people called Shakers, were nothing more than exemptions from the recent restrictions of trusts. They were authorized to continue, enlarge and manage their property, by trusts, as they had done before the change in that title of our law effected by the revised statutes. Had the law, in addition to this, made every Shakers' United Society a body corporate, without otherwise varying the original trust, the only change would have been the conversion of a trust into an artificial legal person, with the same effect substantially as to the interests of those beneficially interested.

Our act for general religious incorporations regulates the incorporation of churches of all religious denominations (other than those provided for in the first and second sections) by trustees, who are to be a body corporate.

Those who have had occasion to look into the mode in which dissenting religious trusts are held in England, as I presume they were, in the same manner, in New York, when a colony, will, I think, perceive that our statute adds little more than a convenient corporate character to powers elsewhere, and formerly here, exercised under trusts.

All these considerations lead me to the conviction that, for the purpose of constitutional interpretation, we must look to the strict legal meaning of the phrase body politic or corporate, and not to those circumstances or adjuncts which amount only to descriptions of the manner in which such bodies are very frequently constituted when used for purposes of profit. If this be regarded as a very strict rule of interpretation, let it also be remembered that it is applied where such strictness is most appropriate, in the interpretation of a provision restraining the general sovereign power of the state expressing the public will through a majority of the people's representatives. . . .

The most peculiar, and the strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence. Now this is not found in the associations under the act. A corporation can sue and be sued only by its corporate name. It can act only according to the letter of the law creating it. "It derives all its powers from that act," says Chief Justice Marshall, "and is capable of exercising its faculties only in the manner which that act authorizes." It has no natural powers which, in its discretion, it may exercise or not. It can exercise none of those other powers, and possesses none of those other rights which the individuals composing it could possess and exercise, were it a mere society or partnership. Not so as to these associations. By this act, suits on behalf of such associations may be brought in the name of the president. Persons having claims against the company may maintain their actions against the president. But there is no reason, except that of mere convenience, why the association may not also sue and be sued under their several real names, as other partners may. This reason of convenience, it is obvious, would not apply where the company was composed of a few persons, as if, for example, one of our great banking firms were to come under the law.

It was indeed argued that the technical construction which gives to may the meaning of must or shall, applies here. But that construction holds only when there is a previous duty, to which the statute adds some new power or authority, as in the case of a public officer; or where from other reasons it is manifest that (to use Judge Story's words) "the legislature meant to impose an absolute duty, not to give a discretionary power;" otherwise, as he says, "the ordinary use of language must be presumed to be intended, unless it would defeat the the provisions of the act." 1 Peters R. 64. The ordinary popular discretionary sense of the word may is also the ordinary legal one. The other is the exception. In our revised statutes the words may and shall are so used and distinguished. So they are in our annual legislation, as when it is said of a company that it may hold real estate, may take a certain rate of tolls, may borrow money.

Moreover, here the right to sue and be sued, as other partners, is a common-law right, and cannot be taken away by mere implication.

"A statute made in the affirmative, without negative words," say the highest authorities, "does not take away the common law." 2 Inst. 200. See also Dwarris on Statutes, 637, and the authorities there referred to. . . .

Again: these associations do not act by a corporate name and seal, but by another mode familiar to our law. They can contract through their president, as a limited partnership must through its general partner. They are authorized to sue and be sued through him; as Judge Cowen observes, "The power of the legislature to give a right of action to one man in his own name for a debt due to another has always been exercised from our earliest legal history, and it is now too late to call it in question." I refer to the several legislative and judicial authorities which he has collected in his opinion on these cases. They cannot hold real estate as a corporation does, or contract concerning it by their own name and common seal; but, like partnerships, they can have an equitable and beneficial interest in land. Collyer, 70, 76. Their president takes as a trustee, and the associates are but beneficiaries. . . .

How then are these associations to be regarded in legal contemplation?

I assent fully to the conclusive reasoning of the counsel, who chiefly pressed this part of the argument (Mr. Kent), that they are copartnerships relieved from the inhibitions of the restraining act, and thus allowed to carry on banking business under certain conditions. The policy of the state has prohibited its citizens from issuing paper for circulation as money, or from associating together for certain banking purposes. 1 R. S. 711. It reserved those privileges for corporate banks. The act to authorize the business of banking repealed that prohibition pro tanto, as to all individuals or companies who would comply with its conditions. The associations in question are partnerships complying with those conditions, and thus exempted, as any other citizens may be on the same terms, from the operation of a statutory restraint of general right, which is still binding on all who will not comply with the conditions. This is so far in close analogy to the law of special partnership, where exemption from the general liability imposed by the law is tendered to all who comply strictly with the provisions of the statute. The articles and certificate in this act correspond to the certificate setting forth the names of partners, amount of capital, time of termination and nature of business, required by the title of "Limited Partnerships," 1 R. S. 764, and with the articles which every such copartnership must have. The general partner there is authorized to transact business and contract for the rest; so, though with less authority, is the president here. The mode of suing and being sued is precisely the same in both cases. . . .

On the question being put, Shall these judgments be reversed? all we members of the court, with but a single exception (twenty-three

being present), voted in the *negative*. Whereupon the judgments of the supreme court were AFFIRMED. The court thereupon adopted the following resolutions:—

- 1. "Resolved, That the law entitled 'An act to authorize the business of banking,' passed 18th April, 1838, is valid, and was constitutionally enacted, although it may not have received the assent of two-thirds of the members elected to each branch of the legislature." This resolution was adopted by a vote of 23 to 1.
- 2. "Resolved, That the associations organized in conformity with the provisions of the act entitled 'An act to authorize the business of banking,' passed April 1st, 1838, are *not* bodies politic or corporate, within the spirit and meaning of the constitution." This resolution was adopted by a vote of 22 to 3.¹

Bronson, J., in PEOPLE v. ASSESSORS OF WATERTOWN.

1841. 1 Hill, New York, 620-623.

A corporation aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person. It does not occur to my mind that anything else can be essential to the definition. Such a union as I have mentioned can only be effected under a grant of privileges from the sovereign power of the state. A corporation is therefore said to be a legal being, or the mere creature of law. It is convenient, though not absolutely necessary, that this artificial person, like a natural one, should have a name by which it may be known and designated in the transaction of business. And when the doctrine was that a corporation could only contract by its seal, a seal was said to be an indispensable requisite. So immortality was once thought to be an attribute of all corporations; but that now means no more than a continued succession of members for such period, whether long or short, as may be allotted to this legal entity by its creator.

Now, a banking association, formed under the law of 1838, not only may, but it must have a name; and a seal, though far from being essential to the existence of a corporation, is nevertheless an incident to the grant of corporate privileges, though not mentioned in the grant. This is not only so at the common law, but by the statute also. 1 R. S.

¹ As to the reasons for adopting these "resolutions," and as to the effect of the same, see the elaborate explanation of Walworth, Chancellor, in 2 Denio, pp. 382 to 386. But compare Bronson, J., in 1 Hill, pp. 618 to 620. — Ed.

599, § 1. The right to sue and be sued is expressly conferred on these associations; and whether the suit is brought in the name by which the company transacts its other business, or with the addition of the name of its president, cannot be material. A corporation may have one name for one purpose, and another name for another purpose. And besides, the general banking law only provides that actions may — not that they shall — be brought in the name of, or against the president; and the right to sue and be sued, like that of having a common seal, is not only a common-law incident to the grant of corporate powers, but the legislature has expressly provided that this power shall vest in every corporation, although not specified in the act under which it shall be incorporated. 1 R. S. 599, §§ 1, 2. We have already held, more than once, that these associations may sue or be sued in the same corporate name by which their other business is transacted.

The individuals composing these associations are united in one body, and the members lost in the corporate existence. It is not the individual members, but the legal being which acts and transacts business. A continued succession of members, without changing the identity of the body, is also as completely secured to these institutions as it ever was to any other corporation. As to the period or duration of this continued succession, they surely have scope and verge enough. I observe from the articles on file, that one of these associations has agreed to live about five thousand years, and there is nothing in the general bank law to prevent the associates from writing eternity, instead of time, as the period of corporate existence. It is true that the association may come to an end somewhat short of the mark, and the one to which I allude has, I believe, already expired, but that was no fault of the charter.

What I had specially in view in adding anything to what has already been said upon this question, was to bring the matter to a single and very plain test. Take one of these associations when formed pursuant to law, — say the Bank of Commerce in the city of New York, — and compare it with its neighbor, the Bank of America, which has a special charter from the legislature; and then I have yet to learn what corporate capacity the one wants which the other has. No man can, I think, point out a substantial difference in the nature or essential attributes of the two institutions. The individual members are as completely merged in the legal body, and a succession of members is as effectually secured in the one case as in the other. In both cases it is the body, by means of its officers and agents, and not the individual members, which acts and transacts business. If the one is not a corporation, the other is not a corporation.

We must not examine the charter of these associations in detached parcels, and say that neither this power nor that makes a corporation. It is quite easy when the parts of a time-piece have been separated, to place the finger upon each wheel in succession and say, This is not a a clock; but let the parts be again combined, and the machine be set

in motion, and it will then require some hardihood to deny that it is a clock. We must look at these associations as they appear when formed and in action, and then they fall nothing short of that legal entity which has hitherto been called a corporation. Others may doubt this. I cannot.

The principal difference between a safety fund and a free bank consists in the fact that the latter has larger privileges than the former. But whether a corporation or not, does not depend upon the number or magnitude of its powers, nor the manner in which they were conferred. An association under our general laws for a village library, or to tan hides, possesses all the essential attributes of a corporation in as great perfection as the Bank of England or the East India Company. Nor is it important in what mode, or by what name or particular agency, this artificial being transacts its business. It is enough that it has a capacity to act in some form as a legal being.

It may be true, as has been argued, that the legislature intended to 'make a legal being, and give it all the essential attributes of a corporate body, and yet that it should not be a corporation. That, the legislature could not do. I do not refer to any written constitution. The constitution of things—the order of nature—forbids it. Human powers are not equal to the task of changing a thing by merely changing its name.

HAND, SENATOR, IN GIFFORD v. LIVINGSTON.

1845. 2 Denio, New York, 395-398.

A corporation, according to my understanding, is a franchise granted by government, by which the members merge their individual characacters into one artificial legal existence. It seems to me that but two requisites are necessary, - that it should be authorized by government, and that the members should be combined into an artificial unity. We are sometimes told that corporations must have perpetual succession, a right to sue and be sued and to hold property; that they must have a common seal and power to make by-laws. Blackstone says these are inseparably incident to corporations; and our statute is to the same effect. 1 Bl. Com. 475; 1 R. S. 599. But these attributes are merely incidental to a corporation as such. It is not essential to the existence of a corporation that it should possess them all. Even as to succession, why would not an authority to particular individuals named in the act to assume a corporate name and act as a corporation in certain business during their joint lives, be a corporation? As to the right to sue and be sued, have a seal, and make by-laws, it was decided more than two centuries ago that these, if in the charter, were merely declaratory, and were not necessary to create a corporation. 10 Rep. 32; 1 Roll. Abr. 513, b. 10; 3 Rep. 73; Norris v. Staps. Hob. 211; Davenant v. Hurdis, Moor, 564; 2 Bac. Abr. Corp. D.; 1 Bl. Com. 475. Clearly no particular form of words is necessary to create a corporation. 10 Rep. 32; 3 Id. 73; 2 Danv. Abr. 214; 1 Roll. Abr. 513, b. 10. The case in 10 Rep. 30b, 31a, certainly seems to decide that a corporation may exist without all of these incidents. See also Allen v. Sewall, 2 Wend. 327; 6 Id. 348, s. c. in error, per Walworth, Chan. I suppose that at the present day there can be no dispute in this country but that the grant of a franchise must emanate from the government. Blackstone says that among the Romans a corporation could be formed by voluntary association; but this is denied in 1 Brown's Civil Law, 99. However this may be, it is now settled that all voluntary associations are no more than partnerships. Our law knows but two classes of such associations; corporations and partnerships. Even authorized joint stock companies in England are nothing more than partnerships. The King v. Dodd, 9 East, 516; 3 Ves. & B. 180; Wordsworth on Joint Stock Co. 110; 9 Barn. & Cress. 401; 1 Id. 74; Keasley v. Codd, 2 Carr. & P. 408, note; Maudslay v. Le Blanc, Id. 409, note; Coll. on Part. 626, 651; McCullock's Com. Dic. Companies.

I have no doubt but that a corporation may be shorn of some of the incidents, by the power giving it existence. Indeed, we have made the members of manufacturing corporations personally liable to a certain extent. And on the other hand, in England at least, powers can be given to partnerships which are similar to some of those said to be incidental to corporations. Steward v. Greaves, 10 Mees. & Welsb. 711; Beech v. Eyre, 5 Mann. & Gr. 415. The criterion is not, whether there are not certain powers and rights that are common to both; but the great distinctive feature of a corporation is, that it is authorized by a law or grant to act as an artificial being, the several members of which constitute one person in law, and have but a single will.

Having discussed the nature of corporations, we are led next to inquire whether associations under the general banking law are corporations. This court has at least once, and the supreme court has repeatedly, declared that they are; and even the case of Warner v. Beers does not decide the contrary. Indeed, I understand that the learned chancellor could not in that case vote for the second resolution as first proposed, because it declared unqualifiedly that they were not corporations. Do they possess the attributes of corporations within the settled definitions of that term? To determine this requires an examination of the nature and powers of these institutions. They have their existence by an act of the government; the members are so combined as to lose their individual character, and they act solely as an artificial being; they have power to sue and be sued by an artificial name, and may use a common seal; they may appoint and remove officers, and can only act by those officers. The individuals cannot, as such, do any act to

bind the association. A member may be sued at law by the association: the individual members are not liable for the debts of the association, and they hold their interest by transferable shares. There is perpetual succession, and immortality, by which I understand that the association is not affected by a change of members or the death of any number of them less than the whole. In short, every quality and power, express and incidental, that has ever been attributed to corporations, appear to be given by the legislature to these associations. One or two of these powers are not expressly mentioned in the statute, but we have seen that they are always implied. If, then, they come into existence as corporations do, and have all the powers and qualities of corporations, can they be denied that character because the legislature has not called them corporations? The act does not declare that they shall not be corporations; and if it had, the essence of the thing could not be altered by an arbitrary change of name.

ANDREWS BROS. CO. v. YOUNGSTOWN COKE CO., Limited.

1898. 58 U.S. Appeals, 444.1

Error to the U.S. Circuit Court for the Eastern Division of the Northern District of Ohio.

Before Taft and Lurton, Circuit Judges, and Clark, District Judge.

Action by Youngstown Coke Co., Limited, against Andrews Bros. Co., an Ohio corporation. Judgment below for the original plaintiffs. *Thomas W. Sanderson*, for plaintiff in error.

John G. White (Homer E. Stewart, James W. Stewart, and White, Johnson, McCaslin & Cannon were on the brief), for defendant in error.

Lurton, Circuit Judge. The first and principal question is whether the circuit court had jurisdiction. The plaintiff is described in its original petition as "a limited partnership association, duly organized and existing under and by virtue of the laws of the state of Pennsylvania, of which state it is a citizen." This was perhaps an insufficient statement of its corporate character, under Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, and Carnegie, Phipps & Co. v. Hulbert, 3 C. C. A. 391, 53 Fed. 10. To meet this difficulty, an amended petition was filed, in which it was averred that the plaintiff was a corporation under the laws of Pennsylvania and a citizen of that state. The defendant in an amended answer, and by way of abatement, admits that the plaintiff company was created and organized under the Pennsylvania act of June 2, 1874, but denies that it thereby became either a

 $^{^1}$ Statement abridged. Portions of opinion omitted. So much of the opinion as is given is reprinted from 86 Federal Reporter, 586 et seq. — ED.

corporation or a citizen of said state, within the meaning and effect of the statutes of the United States, requiring diversity of citizenship to give jurisdiction to a United States court.

The act of June 2, 1874 [as amended], under which the defendant in error was organized, is in 17 sections. The first provides that three or more persons desiring to organize under the act may do so by preparing, signing, and acknowledging a statement in writing which shall set forth the amount of capital subscribed for by each; the total amount of capital, and when and how to be paid; the character of the business and location of same; the name of the association, with the word "Limited" added thereto as part of same; the duration of the association, which shall not exceed 20 years; and the names of the officers selected in conformity with the act. The second section provides that the members of the association shall not be liable for the debts or engagements of the company beyond their unpaid subscriptions to the capital. The fourth section provides that interests in such associations shall be personal estates, and may be transferred, given, bequeathed, distributed, sold, or assigned under such rules and regulations as shall be adopted from time to time — "by a vote of a majority of the members in number and value of their interests; and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy or otherwise, which occurs in the absence of any rules and regulations of such association regulating such transfer, and which is not followed by election to membership in such associations, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisement shall be subject to the approval of said court."

The fifth section provides for a board of managers, who shall be not less than three nor more than five, one of whom shall be chairman, one the treasurer, and one the secretary. This section also provides that "No debt shall be contracted or liability incurred for such association, except by one or more of the managers, and no liability greater than five hundred dollars, except against the person incurring it, shall bind the association, unless reduced to writing and signed by at least two managers."

The sixth and seventh sections provide for distribution of profits through dividends, such dividends not to impair capital, and that it shall be unlawful to lend its credit, name, or capital to any member, or to any other person, without consent of a majority in number and value of members in writing. The eight, ninth, and tenth sections provide how such companies may be dissolved, and how the property shall be distributed. The remaining parts of the act provide — First, that the association may sue and be sued in its associate name, service of process to be made upon one of its officers, or on any agent, clerk, or manager in counties where it may maintain an office; second, that such associations may acquire, hold, and convey real estate in its associated name.

This act does not declare these associations to be "corporations," nor are they styled "corporations." They are called "partnership associations." Neither does the act disclaim a purpose to create corporations, as was the case under the English and New York joint-stock acts mentioned and construed in Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, and People v. Coleman, 133 N. Y. 279, 31 N. E. 96. But the fact of corporation or no corporation must depend upon the existence or nonexistence of those faculties which are of the essence of corporate existence. We need not be too attentive to mere names. The inquiry must go deeper, and a solution be reached upon principle. [The learned judge here quoted from the opinions in Thomas v. Dakin, 22 Wendell, 9, 70, 103, and Liverpool Ins. Co. v. Massachusetts, 10 Wallace, 566, 576.]

Definitions are dangerous. They are most often too narrow, but not infrequently too broad. Many definitions of a corporation have been attempted. Most of them include one or more faculties which in this country are clearly not essential, or are included within more general powers already catalogued.

It is not essential to the idea of a corporation that it shall have perpetual existence, for limited corporations are a matter of most common occurrence, whether organized under special or general laws. Neither is it essential that it shall have capacity to sue and be sued under its corporate name, for it may be authorized only to sue in the name of one of its officers, as was the case under the New York banking law. That it shall have capacity to sue and be sued under some name standing for the collective body is all that is necessary. Thomas v. Dakin, 22 Wend. 9; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566. In the last analysis, the only absolutely essential attribute of a corporation is the capacity to exist and act within the powers granted, as a legal entity, apart from the individual or individuals who constitute its members.

But these associations authorized by the Pennsylvania act of 1874 possess every attribute deemed essential to the existence of a corporation under any authoritative definition of a corporation. They come into being only by the creative power of the sovereign will, as expressed in the statute which authorizes their organization. That act

constitutes at once the authority for their existence and the measure of their powers. When organized, they constitute a new artificial person, endowed with the power of suing and being sued, and of acquiring, holding, and conveying property in its artificial character. Created by compliance with the constating law, they can be dissolved only in the way pointed out by that law. Individual liability for corporate debts, beyond unpaid subscription to the capital stock, does not exist. Coal Co. v. Rogers, 108 Pa. St. 147-150; Stevens v. Ball Club, 142 Pa. St. 52-61, 21 Atl. 797. The members do not act as individuals, or as partners, but through and in the name of the collective or corporate body. Hill v. Stetler, 127 Pa. St. 145-162, 13 Atl. 306, and 17 Atl. 887. The members are not liable individually for the torts of the association, unless they personally participate. Whitney v. Backus, 149 Pa. St. 29, 24 Atl. 51. In all these respects it would be difficult to distinguish these companies from the ordinary business corporations authorized under general acts in most, if not all, of the states of the Union. In other respects they are somewhat peculiar, and it is these peculiar features which distinguish them from the ordinary business corporations provided for by other Pennsylvania legislation, and which have led to some confusion in defining their character. Thus, the managers alone may create a debt, and no liability in excess of \$500 is valid, unless the contract be in writing. and signed by two, at least, of the managers. This is a mere limitation upon the usual powers of officers and agents to bind the artificial body, and in no way affects the corporate character of that body. But the most marked peculiarity is found in the provisions of the fourth section of the constituting act, whereby, in the absence of some other regulation, adopted by the members, the assignee of the interest of a member in the capital stock, by operation of law or otherwise, does not become a member until elected. In default of election, the association must pay the value of the interest as ascertained by agreement, or, in default thereof, by an appraiser, provided for in the statute. This dilectus personarum is a most inviting inducement to the formation of small business corporations, where the personnel of the members is a matter of some importance, and is the only feature which particularly distinguishes these associations from ordinary corporations. This power of selection is similar to that belonging to ordinary co-partnerships. A member may sell his interest, but such sale dissolves the partnership. If the remaining members assent to the admission of the new member, the legal result is a new firm. Under this provision of the act of 1874, the sale of an inter-\ est does not operate as a dissolution, but requires that the company shall buy the interest unless the transferee is acceptable. The principle is not new in partnerships where the partners give a preference to the firm or its members by contract in event of sale or other devo-

[After stating, and quoting from, Carter v. Producers' Oil Co., Limited, 182 Pa. State, 551.]

The most that can be said of this decision is that the court declined to classify these companies with ordinary corporations, and contented itself with giving it its statutory designation. We have already seen by the Pennsylvania cases cited that that court had time and again held these companies to have the very attributes which enable us to distinguish a corporation from a mere partnership. The fact that these companies were not called corporations in the act of 1874, and that they possessed this dilectus personarum, has led to some confusion of terminology in the effort to describe them.

[After quoting from various Pennsylvania decisions.]

These decisions are not overruled or criticised in Carter v. Oil Co., heretofore cited. We do not therefore agree with counsel for plaintiff in error that the Supreme Court of Pennsylvania has determined that such associations are not corporations; on the contrary, the corporate character of the organization is most distinctly recognized, though distinguished from the ordinary corporation provided for by other general statutes. "A new artificial person," organized under a statute, and empowered thereby to contract, hold, and convey property, sue and be sued, as such, is a corporation, and can be nothing else. In addition to the recognition of these associations as corporations of a peculiar character by the Pennsylvania court, we may add the pregnant circumstance that section 13 of article 16 of the state constitution provides as follows:—

"The term 'corporations,' as used in this article, shall be construed to include all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships."

Article 16 is devoted to the subject of private corporations and their regulation.

But does the existence of the dilectus personarum take from the body possessing it the character of a corporation, if it possesses those attributes which, by general consent, distinguish a corporation from a mere voluntary association? The general and well-settled rule is that, in the absence of statutory authority, a corporation may not make the transfer of shares dependent upon the discretion of the corporation, its officers or agents. They may by reasonable rule regulate such transfer, but they cannot prohibit. Mor. Priv. Corp. §§ 164, 165. But that this power may be conferred by the charter is equally well settled. Id., and authorities cited; Lowell, Stocks, § 31. This privilege of the dilectus personarum, while unusual in corporations for profit, is a very common provision in the charters of companies not for profits, such as clubs, boards of trade, fraternal societies, educational and charitable associations. Joint-stock companies have no invariable character. Sometimes they are incorporated, and sometimes they are not. The test is the attributes conferred by the statute under which they are organized. Mor. Priv. Corp. § 6. Certain express companies, widely known in this country as joint-stock companies, have been held not to be corporations, within the meaning of local taxing laws.

The case of *People* v. *Coleman*, 133 N. Y. 279, 31 N. E. 96, is interesting as showing the history and legislative origin of certain of these companies. The case only involved the question as to whether there was a legislative or practical distinction between joint-stock associations and corporations organized under the law of New York, and whether the capital of a joint-stock company was taxable under a New York statute, taxing the capital stock of corporations. The court refers to *People* v. *Wemple*, 117 N. Y. 136, 22 N. E. 1046, and says that case "shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations until the difference, if there be one, is obscure, elusive, and difficult to see and describe." (The italics are ours.)

In endeavoring to discover whether any difference remained, the New York court, speaking through Finch, J., said:—

"But I think there was an original and inherent difference between the corporate and joint-stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent. and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body, and drowns in it the individual rights and liabilities of the members. while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in Supervisors of Niagara v. People, 7 Hill, 512, and in Gifford v. Livingston, 2 Denio, 380, by the statement that the corporators lost their individuality, and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined on behalf of the respondents to be an 'artificial person, created by the sovereign from natural persons, and in which artificial person the natural persons of which it is composed become merged and nonexistent.' I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted if it successfully bears some sufficient test. In putting it on trial, we may take the nature of the individual liability of the corporators on the one hand, and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character. It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the mem-

bers from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. . . . Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. . . . We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new or retention of the ' old liability by an affirmative enactment, which avoids the inherent effect of the corporate creation. In the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members. The debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liability of its corporators. The creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other from the sovereignty of the state. The two are alike, but not the same. More or less, they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say in Van Aerman v. Bleistein, 102 N. Y. 360, 7 N. E. 537, that a joint-stock company is a partnership, with some of the powers of a corporation. Beyond that we do not think it is our duty to go."

If the nonliability of the members for the collection of debts be in fact a test of a corporation, then these Pennsylvania companies are clearly corporations under this authority. But we cannot be supposed to concede this. In *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566–575, the fact of the liability for company debts of the members of the Liverpool Insurance Company was held to be no sufficient test of the corporate character of that joint-stock association. Justice Miller, as to this, said:

"To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But, however the law on this subject may be in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corpora-

tions of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain."

The Massachusetts court is cited as holding that these Pennsylvania associations are not corporations, and could not, therefore, be sued in Massachusetts as such. Edwards v. Gasoline Works, 168 Mass. 564, 47 N. E. 502. The case does so hold. But the decision is expressly rested upon the earlier Massachusetts cases holding that joint-stock companies organized under the law of that State were mere partnerships. Tappan v. Bailey, 4 Metc. (Mass.) 529; Tyrrell v. Washburn, 6 Allen, 466. "If," says Lathrop, J., delivering the opinion of the court, "the question were an open one in this commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one." The court in that case express their unwillingness to adopt the views of the Supreme Court of the United States in Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, and say that their own decision, reported in Oliver v. Insurance Co., 100 Mass. 531, and affirmed in that opinion, was rested upon the ground stated by Justice Bradley in his dissenting opinion. We have neither the disposition nor the freedom of the Massachusetts court in respect to the opinion of the Supreme Court in Liverpool Ins. Co. v. Massachusetts. The Youngstown Coke Company presents many more of the characteristic features of a corporation than did the Liverpool Insurance Company, and that case is an authority most strongly supporting our conclusion that it is a corporation. The same conclusion was reached in regard to another one of these Pennsylvania associations by Judge Lacombe, in Bushnell v. Park Bros. & Co., 46 Fed. 209. That case was subsequently affirmed by the Court of Appeals, in 9 C. C. A. 138, 60 Fed. 583, though this question seems to have been abandoned by the plaintiff in error, against whose protest the case had been removed from the state court. Our conclusion, therefore, is that the Youngstown Coke Company is a corporation and a citizen of Pennsylvania, within the meaning of the jurisdictional requirement in respect to diversity of citizenship.

Judgment affirmed.

GREAT SOUTHERN FIRE PROOF HOTEL CO. v. JONES.

1900. 177 U.S. 449.1

Jones & Co. brought a bill in the U. S. Circuit Court for Ohio, against an Ohio corporation and various other defendants. The bill describes the plaintiffs as "members of the limited partnership association doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association, organized under an act of the General Assembly of Pennsylvania, approved June 23d [2d], 1874, entitled 'An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances,'"... and which association is "a citizen of the State of Pennsylvania."

The claim of Jones & Co. was founded on the mechanics' lien statute of Ohio. The Hotel Company demurred to the bill; contending that the said statute was unconstitutional. After a decision in favor of Jones & Co. in the U. S. Circuit Court of Appeals, the Hotel Company brought the case to the U. S. Supreme Court on a writ of certiorari.

Upon the argument in the Supreme Court, that court suggested the question (not raised by counsel, nor argued in the court below), whether the case as presented by the record was one of which the U. S. Circuit Court could take cognizance by reason of diversity of citizenship.

John E. Sater and D. F. Pugh, for petitioner.

Talfourd P. Linn and Louis G. Addison, for respondents.

HARLAN, J. . . . We are of opinion that the plaintiff as a limited partnership association was not entitled to invoke the jurisdiction of the Circuit Court. It was not alleged to be, nor could it have alleged that it was, a corporation in virtue of the statute of Pennsylvania under which, according to the averments of the bill, it was organized.

It has been suggested that the plaintiffs are entitled to sue, and may be sued, by their association name. . . . But the capacity to sue and be sued by the name of the association does not make the plaintiffs a

corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation.

[As to Const. Pa. Art. XVI. Sect. 13.] The only effect of that clause is to place the joint-stock companies or associations referred to under

¹ Statement abridged. Portions of opinion omitted. - ED.

the restrictions imposed by that article upon corporations; and not to invest them with all the attributes of corporations.

We have not been referred to any case in the Supreme Court of Pennsylvania which distinctly places limited partnership associations, created under the statutes of that State, on the basis of corporations.

That a limited partnership association created under the Pennsylvania statute may be described as a "quasi corporation," having some of the characteristics of a corporation, or as a "new artificial person," is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.

We have not overlooked the case of Andrews Bros. Co. v. Youngstown Coke Co., 58 U. S. App. 444, in which the Circuit Court of Appeals for the Sixth Circuit, speaking by Judge Lurton, held that limited partnership associations organized under the Pennsylvania statute were corporations within the jurisdictional requirement of diverse citizenship. For the reasons stated, we are unable to concur in the view taken by that court.

We therefore adjudge that . . . it was necessary to set out the citizenship of the individual members of the partnership association of Jones & Laughlins, Limited, which brought this suit.

Without considering the merits of the case, we are constrained to reverse the judgments of the Circuit Court of Appeals and of the Circuit Court, and remand the cause for further proceedings consistent with this opinion. Under the circumstances, the plaintiffs should be allowed, upon application, to amend the bill upon the subject of the citizenship of the parties.

CHAPTER II.

DISTINCTION BETWEEN CORPORATION AND STOCK-HOLDERS.¹

SECTION I.

The Distinction applied Generally.

RUSSELL ET ALS., APPELLANTS v. TEMPLE ET AL., APPELLEES.

1798. Supreme Court of Massachusetts. 3 Dane's Abridgment, 108.

[PROBATE APPEAL.] In this case the heirs of Thomas Russell contended that his shares in Malden, Charles-river, Haverhill, Andover, and Merrimack bridges, in Middlesex canal, &c., ought to be considered as real estate, and his widow, afterwards married to Temple, ought to have only her dower for life in them. On the other hand, Temple and wife contended they were personal estate, and ought to be distributed as such, and she have one-third part forever. The strongest case among these, in favor of real estate, was the Middlesex canal, in which the corporation had a fee simple estate, or an estate forever, and a perpetual toll. By the statutes passed respecting this canal and real estate, the property therein was divided into 800 shares, and the shares in the canal, including the towing paths and wharves thereon, were made transferable and taxable as personal estate. This corporation also had power to hold real estate to the amount of £30,000, over and above the canal itself, and this appendant real estate was made taxable as real estate of the corporation in the several towns in which it lay.

It was argued (for the widow) that these shares were personal estate for two reasons:—

1st. Because these estates can only exist in the corporation, which alone can acquire it, alone be seized or possessed of it, alone pass it away, manage or repair it, and so must hold it entire; and that the corporation is a moral person to all the purposes of property. Its tenure is to their successors, or to their successors and assigns; these estates never can vest in or be divided among the individual members, to hold as tenants in common &c., in their private capacities. Only the corporation can forfeit the estate, and that only by forfeiting

 $^{^1}$ The distinction is also discussed in various cases which are given under special topics treated of in subsequent chapters. — ED.

their charter; and only the corporation can be taxed for it on common law principles; and on these can it alone be taken in execution for the debts of the corporation; and on a dissolution of the corporation, "its lands revert to the grantor, or his heirs, and the debts due to or from it are totally extinguished; so that the members of it cannot recover or be charged with them in their natural capacities." And a grant to a corporation can only be for its life or continuance. 2 Bl. Com. 484; 1 Lev. 239; 1 Bac. Abr. 510. The case of the Royal Exchange Insurance Company v. Vaughan, 1 Burr. 155, and Cowper, 79 to 86, Gardner's Case.

Second. Because the share is personal estate, though the corporation hold real estate; for the individual member has no estate, but only a right to such dividends as the corporation, from time to time, assign to him. He is unknown on the grants made to it, and he cannot grant any part of the estate; nor can he be taxed for it but by statute law; nor can any private member of a corporation be distrained for a public concern of it; his only remedy for his dividend is case in assumpsit, or an action on the case for a wrongful refusal or neglect to pay or allow him his part of the profits. 4 Wood's Con. 489, &c.; Cowp. 85; Impey's Modern Pleader, 83; 1 Vent. 351, Dutch v. Warren; 1 Stra. 406; same case, 2 Burr. 1011. So lands may be real estate in one, yet the trees or corn growing on them may be personal estate in another. Lifford's Case, 6 Co. 46 to 50; Imp. M. P. 167.

For the heirs it was urged that these shares were real estate, because it was said the estates were real in the corporations; annexed to the soil; and that if these estates in the corporations were real, the estates of the individual members in them followed their nature, and were real; and that the frequent declarations of the legislature declaring such shares personal estate, at least shew a doubt: that when one has a right to receive rent, he has only a right to receive a sum of money; yet it does not follow that his estate is not real estate, out of which his rent issues.

The judgment of the court was, that these shares were personal estate, and distribution was ordered accordingly. The principal reason of the decision appears to be, because the court considered that the individual member, or shareholder, had only a right of action for a sum of money, his part of the net profits, or dividends. And so the law has been held to be since this decision was made.

WILLIAMSON v. SMOOT.

1819. 7 Martin, Louisiana, 31.

APPEAL from the court of the first district.

Matthews, J., delivered the opinion of the court. The plaintiff having caused an attachment to be levied on the steamboat Alabama, the St. Stephens Steamboat Company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot the defendant owns ten of them, subscribed for by him.

The questions to be decided are: 1. Is it proper for our courts of justice to recognize, in their judicial proceedings, the company as a corporate body? 2. Can the shares or stock of any individual stockholder be legally attached?¹

II. The existence of the claimants being recognized as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it, as to make his interest attachable. The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them. Civ. Code, 88, art. 11.

The court is of opinion that the district court erred in disallowing the claim of the company.

It is therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the attachment of the plaintiff and appellant be quashed, so far as it relates to the said steamboat the Alabama, and that she be released therefrom.

Livingston, for the plaintiffs. Duncan, for the claimants.

ROSS v. ROSS.

1858. 25 Georgia, 297.2

MARTHA B. Ross sued W. W. and F. D. Ross on a note. On this attachment was issued; a summons of garnishment, directed to the Eatonton Railroad; the summons being served on the President. He answered that W. W. R. was the holder of 50 shares of stock in said Road, and F. D. R. of 48 shares therein; and that, in other respects, if in this, the said road did not owe and had not owed either of them, or had any effects of either of them.

¹ The opinion relating to Point I. is omitted. — Ed. ² Statement abridged. — Ed.

Motion to dismiss attachment. Motion denied. Bill of exceptions. Davis & Lawson, for plaintiff in error.

Hudson, contra.

Benning, J. Was the Court right in overruling the motion to dismiss the attachment?

One of the grounds of the motion was, that stock in this railroad is not subject to garnishment by creditors of the stockholders. Was this a good ground?

The answer to this question depends on the import of the act of 1856, "to authorize the issuing of attachments and garnishments," &c.; for, the 55th section of that act repeals "all acts, and parts of acts, upon the subject of attachments and garnishments." Acts of 1856, 38.

By the 13th section of this act the summons of garnishment is to be "directed to any person who may be indebted to, or have property or effects of, the defendant, in their hands."

By this section, then, it would seem that all of the debts, property, and effects of the debtor are subject to garnishment.

But the 16th section says, "where the garnishee appears and answers that he is indebted, or has property, or effects in his hands, belonging to the defendant in attachment, judgment shall be rendered against him, in favor of the plaintiff, for such acknowledged indebtedness, and the property and effects, whatever they may be, shall be delivered into the hands of the Sheriff," &c.

Where the answer is, that he is "indebted," judgment is to be entered against him, "for such acknowledged indebtedness."

Is stock in this railroad such a debt ("indebtedness") of the railroad to the stockholder that a garnishing creditor of the stockholder can enter up judgment for it, against the railroad? It is not; it is a debt which the railroad dares not pay even to the stockholder himself; the road may pay him dividends on it, but that is all. See charter, section 3, Acts of 1850, 240; and charter of Central Railroad Rule 7 (Pr. Dig. 330).

The debt which a corporation owes to one of its stockholders for his stock is a debt of a peculiar nature. It is a debt not to be paid until the corporation comes to wind itself up. When the corporation winds itself up, then it pays back to its stockholders the money it received from them for its stock; during its existence it may pay them profits which it makes on their money, but anything beyond the said profits it dare not pay them. This is generally true. It is true in the case of this corporation.

When will this corporation wind itself up? It may never do so. Its charter sets no limits to the time of its existence. Pr. Dig. 333.

It follows that the time may never come when this corporation will be bound to pay back to the Rosses the money it received from them for their stock. If so, of course, no judgment can be got against the corporation, requiring it to pay that money at any particular time; consequently no judgment can be got against the corporation under the said 16th section of the act, for the judgment it contemplates is one requiring immediate payment.

There is no other part of the act under which such a judgment can

be got.

We may conclude, therefore, that although the language of the 13th section of the act is broad enough to include all debts, yet that the 16th section of the act is such as to require this language to be so restricted that it shall not include such a debt as this; a debt which a corporation owes to one of its stockholders for the money received from him for his stock.

If dividends were due to the Rosses the case would be different. Dividends, there is little doubt, stand on the same footing as ordinary debts due from the corporation to its stockholders.

The judgment that is needed in such a case as the present is a judgment authorizing a sale of the stock. There is no law authorizing such a judgment in attachments or garnishments. 16 Ga. 437. There is a law making "bank and other stock subject to execution." Cobb, Dig. 511. But this law does not reach the present case.

We think, then, that this stock of the Rosses was not subject to this garnishment, and, therefore, that the Court erred in not dismissing the attachment.

It becomes useless to consider the other grounds of the motion.

*Judgment reversed.1**

PARKER ET ALS. v. BETHEL HOTEL CO. ET ALS.

1896. Supreme Court of Tennessee.2

APPEAL from Chancery Court of Maury County.

The Bethel Hotel Co. was incorporated, in 1880, under the general corporations act of 1875; and erected a building used partly for a hotel and partly for other purposes. Sept. 1, 1885, the Bethel Hotel Co. and Lucius Frierson conveyed to Mayes & Dodson the "hotel proper part" of the building, by deed signed "Bethel Hotel Company, W. D. Bethel, President; Lucius Frierson, Secretary and Treasurer; and Lucius Frierson." This conveyance was authorized by a vote of the stockholders at the last meeting ever held by them. No business seems to have been transacted by the corporation after this time. On or about Aug. 28, 1886, Frierson became the owner of all the stock of the company; but, both before and after that date, he pledged various shares as security for debts of his which are still outstanding. The stock so pledged was

¹ In almost all States there are now statutes providing methods whereby a creditor may attach, or levy on, shares of corporate stock owned by his debtor. — ED.

² The statement of facts is abridged from the opinion, contained in advance sheets furnished by the State Reporter. Portions of the opinion are omitted.—ED.

not transferred on the books of the company. He used the remainder of the building as his own up to Jan. 12, 1892, when he executed a deed in his own name, purporting to convey to Webster, in trust, the real estate owned by the Bethel Hotel Company and certain stock in that company. The purpose of this deed was to secure the payment of certain debts owing by Frierson, preferring one creditor and providing for prorata payment of the others. Most of the creditors of Frierson who had loaned him money on the stock of the Bethel Hotel Co. were not provided for in the deed of trust. Parker et als., creditors of Frierson and pledgees of said stock, filed a bill in equity, praying (inter alia) to annul the trust deed to Webster. The cause was heard before the Chancellor of Maury County, and afterwards before the Court of Chancery Appeals, from which the case was taken to the Supreme Court.

G. T. Hughes, Fussell & Wilkes, W. S. Fleming, Jr., Granbery,

& Marks, and John T. Williamson, for Parker.

Figuers & Padgett, E. H. Hatcher, and W. J. Webster, for Hotel Co.

J. C. Bradford, Sp. J. [After fully stating the facts and pleadings.] It may be regarded as settled, therefore, that the legal title to the property conveyed to defendant, Webster, was, at the date of that instrument, in the Bethel Hotel Company, where it had been, unquestioned and undisturbed, since 1880, the year of its incorporation and organization. Defendants insist that, although Frierson may not have been invested with the legal title, he, nevertheless, had such an equitable estate and interest as entitled him to sell and dispose of the property. In other words, that he was the real owner of the property, and, as such, had the absolute right to use or dispose of it.

This alleged equitable estate was not the creation of any deed or written contract, executed by the Bethel Hotel Company, or of any corporate act or resolution adopted by the stockholders or directors, which in terms referred to or defined it, but is rather the result and consequence of certain facts and conditions, the existence of which is

affirmed by the defendants.

It is said that the Bethel Hotel Company, by the alienation of that part of its property built for and adapted to the uses and purposes of a hotel, deprived itself of the means of conducting a hotel business, and that, since 1885, the date of the sale to Mayes & Dodson, it had ceased to exercise its corporate franchises; that the stockholders, at the meeting held in September, 1885, passed a resolution, or agreed among themselves, that the corporation should go into liquidation, and that Lucius Frierson, being then the owner of all the capital stock of the corporation, became, in consequence, the equitable owner of all its property, with full power to use it or dispose of it in such manner as he might choose to do. The position of the defendants seems to be that all rights of the corporation in the property were extinguished, that it had ceased to be affected with any corporate uses, and that it belonged absolutely to Frierson.

The facts affirmed by defendants are not all of them exactly as found by the Court of Chancery Appeals. It is true that the corpora-

tion sold and conveyed the hotel part of its building to Mayes & Dodson, retaining only the stores and opera house, and never afterwards engaged in the business of owning and operating a hotel. Lucius Frierson was not the sole stockholder in 1885, when the hotel was sold, and did not become such until August 28, 1886, when he purchased the Bethel stock. His stock, or a large part of it, at that time and subsequently, was held as collateral security by other parties. It is not true that a resolution was ever adopted by the stockholders directing the liquidation or winding up of the affairs of the corporation. or that they were ever wound up. The facts, as found by the Court of Chancery Appeals on this point, are stated in its opinion in the following words: "It may be fairly inferred, though it does not distinctly appear in terms in the proof, that when the deed was made to Mayes & Dodson it was then understood between W. D. Bethel and Lucius Frierson, they then owning practically all, or nearly all, of the stock, that Bethel should take the proceeds of the sale to Mayes & Dodson, amounting to \$22,500, and a sufficient amount, in addition, from Lucius Frierson, personally, to make \$30,000, and for this he would transfer his stock, \$61,000, to Frierson, and that this arrangement was consummated, so far as it could be done without direct corporate action of the corporation itself, by the paper of August 28, 1886, made by Bethel to Frierson, and this is what they understood by the resolution to go into liquidation, there being no debts due by the corporation, and, following out this idea, from the date of the sale to Mayes & Dodson, Lucius Frierson proceeded to treat the property as his own, on the idea that he himself constituted the corporation. We do not think that he entertained the idea that the corporation was defunct, but simply that he was, himself, the corporation, and could do what he wished with the assets."

In considering the position of the defendants, that Frierson became the equitable owner of the assets of the corporation, we must, therefore, leave out of view the idea that there was any corporate action looking to a dissolution of the corporation and winding up of its affairs. Frierson's estate or interest in the property, if he had any, rests on the postulate that, in consequence of the nonuser of its franchises and his sole proprietorship of all its capital stock, the corporation was dissolved, and he became the equitable owner of all its property.

A corporation can be dissolved, and its existence wholly terminated, only by the extinguishment of the corporate franchises conferred by the State. An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs whenever a majority of the stockholders may deem it advisable (Treadwell v. Salisbury Mfg. Co., 7 Gray, 393; Black v. Delaware & C. Canal Co., 22 N. J. Eq., 416); but the franchises conferred upon the stockholders by the State are not extinguished by the cessation from business thus brought about. 2 Morawetz on Corp., § 1004.

It is claimed by the defendants that the dissolution of the corporation was effected by the fact that Lucius Frierson became the sole owner of all its capital stock. Admitting it to be true that he was the owner of all the stock of the corporation, it by no means follows that the corporation was thereby dissolved and forfeited its franchises. On this question the latest text writer on corporation law has this to say, viz.: "Contrary to early opinion, it is now generally held that the fact that all the shares in a joint stock company have passed into the hands of two members, or even into the hands of a single person, does not, ipso facto, work a dissolution of the corporation, since such sole owner may so dispose of the shares, as, by the election of the necessary directors and officers, to continue the corporate existence." 51 Thompson's Commentaries on the Law of Corporations, Sec. 6653. And, in 2 Morawetz on Corporations, Sec. 1009, it is said: "It is well settled that all the shares of a corporation may be held by \mathbf{a}_{\wedge} single person, and yet the corporation continue to exist, and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule." It has been held that a corporation which has sold all its assets, with the intention of putting an end to its business, whose officers had all resigned, and whose stockholders had all transferred their shares to a single person, was, nevertheless, not dissolved, and that its existence could be terminated only by judgment of forfeiture or by surrender accepted by the State. Russell v. McLellan, 14 Pick. (Mass.), 69, 70; Newton Mfg. Co. v. White, 42 Ga., 148; Baldwin v. Canfield, 26 Minn., 43.

The dissolution of a pecuniary or business corporation is effected in i one of the following ways, viz.: (1) by the expiration of its charter; (2) by Act of the Legislature, where power is reserved for that purpose, or there is no constitutional inhibition; (3) by surrender of charter which is accepted; (4) by forfeiture of the franchises and judgment of dissolution pronounced by a Court having jurisdiction. 2 Morawetz, Sec. 1004; Taylor on Private Corporations, Sec. 430. It is not pretended that the Bethel Hotel Company was dissolved in either of the ways indicated. The charter of the corporation has not expired, neither has it been repealed by the Legislature, or been surrendered to the State by its members or stockholders. It may be true that there was a nonuser of its franchises by the corporation for a period of seven years or more, occasioned by the sale of the only property it owned which could have been used for hotel purposes. Undoubtedly the nonuser of its franchises by a corporation is ground for dissolution and forfeiture of its charter, at the instance of the State; but until sentence of dissolution has been pronounced by a Court of competent jurisdiction, in a proper proceeding instituted for the purpose, the corporation will continue to exist, notwithstanding its failure to use its franchises. And forfeiture can only be decreed in a proceeding directly instituted for the purpose, by the State granting it. Code (M. & V.) § 1712; State v. Butler, 15 Lea, 104, 110; Jersey

City Gaslight Co. v. Consumers' Gas Co., 40 N. J. Eq., 427; Broadwell v. Merritt, 87 Mo. 95. Until dissolution has been thus judicially pronounced, neither the existence of the corporation or its title to its property can be questioned collaterally.

We are bound to conclude, therefore, that the Bethel Hotel Company was not dissolved, or its franchises extinguished for any of the reasons alleged by the defendants, and that it is now a corporation endued with life, with authority to own property and exercise all the powers conferred on it by its charter.

Defendants insist that the alleged equitable estate of Lucius Frierson in the property of the Bethel Hotel Company, did not depend alone upon the dissolution of the corporation, but resulted also from the fact that he was the sole owner of all its capital stock. The proposition is, that if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or, at least, may sell and dispose of it by deed, if he choose to do so. This proposition is argued by counsel for defendant with force and ability, and is supported by some authority. It has found favor with the Supreme Court of Maryland (Swift v. Smith, 65 Md., 428, 433); but the decision of that learned Court is opposed by the current of authority, and seems to us to overlook and ignore certain principles that are fundamental.

A corporation and its shareholders are distinct legal entities. In Keith v. Clark, 4 Lea, 718, this Court held that, notwithstanding the State owned all the stock in the Bank of Tennessee, "the bank and the State are entirely different legal entities," and, in Lillard v. Porter, 2 Head, 175, it was said, "stockholders are totally distinct from the corporation." Important consequences result from this rule. The shareholders are neither responsible for the debts nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation.

"Shareholders," says Thompson, "are not joint tenants or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation." Commentaries on the Law of Corporations, Sec. 1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed.

In Wheelock v. Moulton, 15 Vt. 519, Redfield, J., stated the reasons for the rule in his usual clear and accurate style. In that case, Moulton and Hutchinson, sole proprietors and owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repay-

ment of money borrowed of the plaintiff, Wheelock. He brought suit to enforce his mortgage. Judge Redfield said: "The fact that the signers of this deed owned the whole of the shares will make no difference in regard to the necessity of a vote of the corporation, in order to convey the land. The title to the land was in the corporation, not in the individual shareholders. The deed of one, or of any number of the stockholders, will not affect the title to the land. The share owners are not tenants in common of the land. They have no title whatever to any of the property of the corporation. It is true that one who owned all the shares might control the corporation, and so he could if he owned a majority of the shares; but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation."

And in *Humphreys* v. *McKissick*, 140 U. S. 304, Mr. Justice Field, discussing the same question, said: "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it, and the corporation acts only through its officers, subject to the conditions prescribed by law."

A very instructive case on this question is *Baldwin* v. *Canfield*, 26 Minn., 43. The facts of that case were very similar to those of this case, and the direct question now under consideration was passed upon. The opinion of the court was in accord with the cases above cited. See also *Button* v. *Hoffman*, 61 Wis., 20.

We are thus led, both by reason and authority, to the conclusion that Lucius Frierson, as sole stockholder of the Bethel Hotel Company, had no title, legal or equitable, to its property. The title to the property was in the Bethel Hotel Company, and could only be conveyed by it. The conveyance of its real estate is one of the most solemn acts of a corporation, and it can only be done in pursuance of a vote of the corporation, and by deed executed in the form and mode prescribed by law. Thompson's Commentaries on the Law of Corporations, Sec. 5096. At common law a corporation could not execute a deed to realty except under seal; and the general corporations Act of 1875, under which the Bethel Hotel Company was organized, provides that, if the corporation have no seal, it shall be bound by the signature of its name by a duly authorized officer.

To have made a valid conveyance of the real estate of the company, it was necessary, therefore, that the deed should have been executed in the name of the corporation, under seal, if it had one, and, if not, its name should have been signed by an agent duly authorized by its governing agency, its board of directors. Garrett v. Belmont Land Co., 94 Tenn., 460. As we have seen, nothing of this kind was done. The deed to defendant, Webster, was executed by Lucius Frierson, in his own name and under his own signature. The Bethel Hotel Company, although it owned the property, was in no sense a party to it.

For this and other reasons given, the deed of Lucius Frierson, conveying the real estate of the Bethel Hotel Company to defendant, W. J. Webster, was void, and conveyed to him no title or interest therein.

We have assumed as a fact, in the preceding discussion, that Lucius Frierson was, in truth, the sole owner of all the shares of stock of the Bethel Hotel Company at the date he executed the deed to Webster. But was he?

[The Court then held that the pledgees of the stock acquired title thereto, even though they took with notice of a by-law of the company that no transfer should be effectual unless made on the books of the company.]

BUNDY v. OPHIR IRON CO.

1882. 38 Ohio State, 300.1

THE Ophir Iron Company was a corporation consisting of ten stock-holders, including the plaintiff, Bundy.

Bundy indorsed notes of the Company upon an agreement that he should be protected by a mortgage upon the Company's real estate.

The mortgage, instead of being executed in the name of the Company as grantor, was, by mistake, executed in the name of the other nine stockholders, thus:—

"Know all men by these presents, that Robert Hoop" [and eight others then named], "the grantors in this instrument, and who together with H. S. Bundy are the sole members and stockholders in the Ophir Iron Company, a corporation duly organized, . . . in consideration of ten thousand dollars paid by said H. S. Bundy to said Ophir Iron Company, . . . do hereby grant . . . to the said H. S. Bundy, . . . all the right, title, interest and estate, legal and equitable, of the aforesaid grantors in and to the following lands and tenements of the said Ophir Iron Company, . . ."

[Then follows the condition that the deed shall be void if the Company shall pay the notes indorsed by Bundy, and shall save Bundy harmless.]

This mortgage deed is signed with the individual names and sealed with the individual seals of the nine persons named as grantors, by whom, as grantors, it is also acknowledged as their voluntary act and deed. It was recorded Dec. 5, 1874.

On April 17, 1875, a second mortgage, on the same premises, was duly executed by the corporation, through its president, to secure all its creditors except Bundy. The latter mortgage recites that it is made "subject, however, to a mortgage in favor of Hezekiah S. Bundy, for the sum of \$10,000, of record in said County," &c.

¹ Statement abridged. Arguments and part of opinion omitted. - Ed.

In May, 1875, various creditors of the corporation (who were also mortgagees in the second mortgage) obtained judgments against it, which took effect as liens upon the lands described in the mortgages.

In August, 1875, Bundy, having paid the notes which he had indorsed, commenced an action to foreclose his mortgage, making various creditors of the corporation parties. The District Court found that the mortgage of Bundy was invalid as against the subsequent creditors of the Company.

Bundy brought error.

W. W. Johnson, with whom were John T. Moore, Porter Du Hadway, and J. B. Foraker, for plaintiff in error.

Wilby & Wald, and C. A. Atkinson, for certain creditors.

WHITE, J. The controversy in this case is between Bundy, claiming as first mortgagee, subsequent judgment creditors, and creditors claiming under the second mortgage.

Two questions arise for consideration: (1) Whether the execution and record of the mortgage of December 5, 1874, to Bundy, give him priority? and, (2) If not, does the recognition of the first mortgage in the second, of April 17, 1875, have that effect?

As to the first question: The consideration upon which Bundy indorsed the notes as surety of the corporation, was that the latter should give him a mortgage upon its property, conditioned that it would pay the notes at maturity, and save him harmless on account of his indorsements. The execution by the stockholders of the first mortgage was the attempted fulfilment of the agreement on the part of the corporation.

The Ophir Iron Company was incorporated under the act of April 12, 1858, providing for the creation and regulation of manufacturing companies. S. & C. 301, 304. Under that act the directors of the company are required to be stockholders; and while it is declared "the directors shall have the general management of the affairs of the company," yet they are made "subject always to the control of the stockholders" in reference to such management.

The mortgage to Bundy now in question, not being made in the name of the corporation, cannot, as against it, be regarded as a legal mortgage; but it is a good, equitable mortgage against the corporation. And if such direction were necessary, it might be considered as equivalent to a direction by the stockholders to the proper officers to make a mortgage in the name of the corporation to Bundy. But such direction was not necessary from the stockholders. The directors, under the agreement by which they obtained Bundy's indorsements of the notes of the corporation, were bound to secure him by the mortgage of the corporation. This they failed to do, by sheer mistake, in the form of executing the mortgage, which it was competent for a court of equity to correct; and which it was their duty to correct without the action of the court. Clayton v. Freet, 10 Ohio St. 544.

If it were not for our statute on the subject of mortgages, this equi-

table mortgage would prevail over all lien-holders and other claimants, except bona fide purchasers, for value. But it has been held, in a long series of decisions, that a mortgage has no effect, under the statute, either in law or equity, as against subsequently acquired liens, until its execution according to the statute, and its delivery to the recorder of the proper county for record. Strang v. Beach, 11 Ohio St. 283; Bercaw v. Cockerill, 20 Id. 163.

But such execution and delivery for record are not required as between the original parties or their heirs. *Bloom* v. *Noggle*, 4 Ohio St. 45; *Sidle* v. *Maxwell*, *Id*. 236.

The second question is: Does the recognition of the first mortgage in the second have the effect to give it priority?

We think this question must be answered in the affirmative. The second mortgage was executed in due form by the corporation, and was made expressly subject to the mortgage to Bundy. Hence, all subsequently acquired liens that are subject to the second mortgage are necessarily also subject to the first. Coe v. Railroad Co., 10 Ohio St. 374; Bercaw v. Cockerill, 20 Id. 166.

It is, however, claimed on behalf of some of the judgment creditors that the second mortgage was not accepted by the mortgagees.

[After overruling this objection, the opinion proceeds as follows]:

Whether Bundy does not stand in such relation to the second mortgage, as to entitle him to insist upon it, both as against the corporation and the subsequent judgment creditors, without reference to its acceptance, may admit of question. But it is a question that need not now be considered. Upon the case as made in the record, the court erred in denying to Bundy the priority to which he was entitled. The judgment must therefore be reversed; and the cause is remanded for further proceedings.

Judgment accordingly.

BUTTON v. HOFFMAN.

1884. 61 Wisconsin, 20.

APPEAL from the Circuit Court for Jackson County.

Replevin. The facts sufficiently appear from the opinion. The defendant appealed from a judgment in favor of the plaintiff.

C. J. Ainsworth and S. U. Pinney, for appellant.

Carl C. Pope, for respondent.

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer.

In his instructions to the jury the learned judge of the Circuit Court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property

belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or indeed of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. Ang. & A. Corp. §§ 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Ang. & A. Corp. § 557. The corporation is the trustee for the management of the property, and the stockholders are the mere cestui que trusts. Gray v. Portland Bank, 3 Mass. 365; Eidman v. Bowman, 58 Ills. 444; s. c. 11 Am. Rep. 90; 4 Am. Corp. Cas. 350. The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. Corp. § 191; Pope v. Brandon, 2 Stew. (Ala.) 401; Whitwell v. Warner, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. Bradley v. Holdsworth, 3 M. & W. 422; Waltham Bank v. Waltham, 10 Met. 334; Tippets v. Walker, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot

diver it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. Corp. §§ 160, 190, 557; Hyatt v. Allen, 56 N. Y. 553; s. c. 15 Am. Rep. 449; 4 Am. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. Wilde v. Jenkins, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. Corp. § 779a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and jointowners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate the business and defraud its creditors. The stockholders would be the owners of the property, and at the same time it would belong to the corporation. One stockholder owning the whole capital stock could of course do what several stockholders could lawfully do. It is said in Utica v. Churchill, 33 N.Y. 161, "the interest of a stockholder is of a collateral nature, and is not the interest of an owner;" and in Hyatt v. Allen, supra, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In Winona, &c. R. Co. v. St. P., &c. R. Co., 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property and immunities. In Baldwin v. Canfield, 26 Minn. 43, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In Bartlett v. Brickett, 14 Allen, 62, an action of replevin was brought by A., B. and C., as the "Trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B. and C., trustees as aforesaid," became bound, and the officer in his return, certified that he had taken a bond "from the within-named A., B. and C.," and the property was receipted by "A., B. and C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judg-

ment was rendered for the defendant. It is said in Van Allen v. Assessors, 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In Wilde v. Jenkins, supra, where a copartnership bought all the property and effects, together with the franchises of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In Mickles v. R. C. Bank, 11 Paige, 118, it was held that although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not be until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In Bennett v. Am. Art Union, 5 Sandf. 614, it was held that "as a general rule, the whole title, legal and equitable (to its property), is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant as a shareholder in the Art Union, for an injunction against a certain disposition of its property was denied, because he had no interest in it. See also Goodwin v. Hardy, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. Timp v. Dockham, 32 Wis. 146; Sensenbrenner v. Mathews, 48 Wis. 250; s. c. 33 Am. Rep. 809. analogy to the above principle it was held in Murphy v. Hanrahan, 50 Wis. 485, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

BY THE COURT. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

GALLAGHER v. GERMANIA BREWING CO.

1893. 53 Minnesota, 214.1

Freeman P. Lane, and Wm. H. Briggs, for appellant. Gretchen & McHugh, for respondents.

The plaintiff, as assignee of one Westphal, under a MITCHELL, J. general assignment for the benefit of creditors, brought this action to recover for goods sold and delivered by his assignor to the defendant corporation. Barge & Vander Horck intervened, and set up in their complaint that they owned, and for nearly two years had owned (each one half), all the capital stock of the defendant, no other person but themselves having any interest in the stock or property of the corporation; that each of them had a valid and unsatisfied judgment against Westphal upon a cause of action which accrued before the assignment to plaintiff; that Westphal was, and for over two years had been, utterly insolvent; and that his estate, of which plaintiff is the assignee, was so hopelessly insolvent that it was insufficient to pay even the expenses of administering the assignment. The relief sought was that their claims against Westphal might be allowed, in equal amounts, as equitable set-offs to the claim of the plaintiff against the defendant corporation. From an order overruling a demurrer to the complaint, the plaintiff appeals, his contention being, First, that Barge & Vander Horck had no such interest in the litigation as to entitle them to intervene; second, that their claims cannot be set off against a claim against the corporation, because a corporation is a legal entity, entirely distinct from its stockholders. These two propositions amount really to the same thing, for, if Barge & Vander Horck cannot set off their claims against that of plaintiff against the corporation, they have no such interest in the subject of litigation as would entitle them to intervene; on the other hand, if their claims are proper, equitable set-offs, their right to intervene for the purpose of setting them up is very clear. The case is certainly a novel one, for we doubt whether an instance can be found in the books where stockholders ever attempted to set up their several equities by way of set-off to claims against the corporation. Of course, the want of a precedent is by no means controlling with courts, especially in administering equitable relief; but it would seem that, if the relief here asked was consistent with legal or equitable principles, some case would be found where it had been granted. The facts of the present case appeal to a natural sense of justice, for while, by fiction of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. Hence, if interveners cannot set off their claims, the practical result is that Westphal's estate will collect its entire claim out of what is really their property, while the estate is at

Statement and arguments omitted. — ED.

the same time indebted to them on claims of greater amount, which they will wholly lose because of Westphal's insolvency; but, as has been often said, hard cases are liable to make bad law.

The right of equitable set-off is, of course, not derived from, or dependent upon, statute, but rests upon a distinctly equitable doctrine, which courts of equity have applied on certain well-recognized equitable grounds, the object being to effect a clear equity and prevent irremediable injustice; and it may be stated as a general rule that, whenever necessary to accomplish that end, the courts will permit an equitable set-off, although the debts accrued in different rights; as, for example, by allowing a separate debt to be set off against a joint debt, or, conversely, a joint debt against a separate debt. They will also disregard the nominal parties to the record, and consider the real parties in interest; as, for example, when the assignor of a chose in action sues for the benefit of the assignee, or a trustee for the benefit of the cestui que trust. Hence, had the plaintiff's claim been a joint one against the interveners, there would have been no doubt of their right to set off their separate claims against it, for insolvency is well recognized as a distinct equitable ground for allowing such a set-off. But such a case is not analogous to the present. To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest. In dealing with the rights of creditors, and the obligations existing between a corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat a corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved, and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall. Inasmuch as the two interveners own all the stock of this corporation, the facts of this case seem comparatively free from embarrassments, and the contention of respondent quite plausible. But, suppose there were fifty other stockholders (which would not alter the principle), what would be the result? Could interveners then interpose their claims as set-offs, and, if so, could they do so to the full amount of their claims, or only in the proportion which their shares bore to the whole capital stock? And, if the former, would they have a claim for the excess against the corporation, or a right to call on the other stockholders for contribution?

Again, the right of set-off, if any exists, must be mutual. Hence, if stockholders can interpose their individual demands as set-offs to a demand against the corporation, it follows that a defendant can set up demands against the individual stockholders as set-offs to demands in favor of the corporation. Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders. What means, if any, the interveners might have had, or may hereafter have, of protecting themselves, it is not now our business to inquire, but we are clear that their claims against plaintiff's assignor are not the subjects of equitable set-off to a claim against the defendant corporation.

Order reversed.

WARING v. CATAWBA CO.

1797. 2 Bay, South Carolina, 109.1

Assumpsit for goods sold, and for work and labour, &c. Plea in abatement.

This case came before the court upon a plea in abatement, which pleaded that plaintiff was himself a member of the company, and therefore could not maintain any action against it in his individual capacity.

Trezevant, for plaintiff.

Attorney-General, contra.

THE COURT, after hearing the arguments, overruled the plea in abatement, as containing principles subversive of justice; but they observed, that the two cases of *Bourdeaux* and *Drayton* against the *Santee Canal Company*, had settled this point, as they had both been allowed by this court to maintain their actions for their salaries, &c., against the company, as well as the cases respecting the other public societies, mentioned in the argument.

The plaintiff was then allowed to go on and prove his debt to a jury.

Present, Burke, Grimke, and Bay; but as Judge Grimke was a member of the company, he declined giving an opinion.

Arguments omitted. — ED.

JOHN FOSTER & SON LIMITED v. COMMISSIONERS OF INLAND REVENUE.

1893. L. R. (1894) 1 Q. B. 516.1

Case stated by Commissioners of Inland Revenue.

The Stamp Act imposes an ad valorem duty "upon conveyance or transfer on sale of any property." The consideration, as appears from another clause of the Act, need not always be money, but may be stock or marketable securities. The Act provides that the term "conveyance on sale" includes every instrument "whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."

Eight persons, who had for many years carried on business in partnership as John Foster & Son, being desirous that the firm should be reconstructed as a Limited Company (registered with limited liability under the Companies Acts), agreed to terminate their partnership, and to transfer all the firm property to a Limited Company, styled John Foster & Son Limited, to be formed of all the partners exclusively for the purpose of taking over the same subject to all the liabilities; the whole of the ordinary shares, preference shares, and debenture stock of the company to be allotted among the partners in proportion to their respective shares in the partnership estate. In accordance with this agreement, by deed of indenture between the eight persons who composed the partnership and the Limited Company, registered under the Companies Acts under the name of John Foster & Son Limited, all the partnership property was conveyed to the Limited Company.

The Commissioners assessed an *ad valorem* duty upon the deed, as coming under the head of a "conveyance or transfer on sale."

In the Queen's Bench Division, CAVE, J. held that the assessment was erroneous, and WRIGHT, J. took the opposite view. WRIGHT, J., withdrew his judgment, and the appeal from the Commissioners was allowed.

From this decision of the Divisional Court, the defendants appealed to the Court of Appeal.

Sir Charles Russell, A. G., and Danckwerts (Sir John Rigby, S. G., with them), for appellants.

Finlay, Q. C., and A. R. Kirby, for respondents. [Argument as condensed in 69 L. T. N. s. p. 817.]

In order to constitute a sale there must be two different parties capable of making an agreement, and there must be two different things, the property sold and the price given for it. In the present case there has merely been a re-arrangement of ownership. The parties remained the same, and nothing was parted with, and nothing was given. It

¹ Statement abridged. Opinions in Queen's Bench Division, and part of arguments pmitted. — Ed.

was like a conveyance of property to trustees upon trust to carry on the business, and divide the proceeds arising from it amongst the conveying persons.

LINDLEY, L. J. I confess that, with great deference to CAVE, J., I cannot see the difficulty in this case.

The material sections of the Act of 1870 must first be considered. The Lord Justice then read ss. 70 and 71 of the Stamp Act, 1870, and continued]: The importance of s. 71, to my mind, is this: it shews that there may be a conveyance on sale, although the consideration for it is not cash or money, but may include or consist of stock or marketable securities. The definition of "stock" and "marketable securities" will be found in s. 2. Then s. 78 imposes a stamp duty on conveyances not otherwise charged, and the schedule shews what the stamps are that are imposed upon conveyances that are charged. First we have "conveyance or transfer whether on sale or otherwise," of certain stocks and dividends. The present case does not come within that head. Then we have "conveyance or transfer on sale, of any property"... "where the amount or value of the consideration for the sale does not exceed £5." That fits in with ss. 70 and 71. Then we come to "Conveyance or transfer by way of security of any property or of any security;" and then we have "Conveyance or transfer of any kind not hereinbefore described." We must accordingly consider under which of these heads the particular deed in this case comes. It certainly does not come under the first, nor under "conveyance or transfer by way of security of any property," and the alternative is between "conveyance or transfer on sale" and "conveyance or transfer of any kind not hereinbefore described."

Now, the document in this case is an indenture made between eight gentlemen of the first eight parts, and "John Foster & Sons Limited (hereinafter called 'the company'), of the 9th part." Pausing there for a moment: although the persons of the first eight parts may be, and were members, and the only members, of John Foster & Co. Limited, John Foster & Co. Limited is not those eight individuals; John Foster & Co. Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one. [The Lord Justice then stated the recitals in and the operative part of the conveyances, and continued]:—

Then the parties of the first eight parts put their seals to the instrument, and the company puts its seal to it. Now, what is that instrument? It is certainly a conveyance of property; that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. The persons conveying are the persons named in the first eight parts, and the persons taking are the corporation named in the ninth part.

Now, what is the consideration? The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of s. 71 of the Act to which I have already alluded. Then what have we got? To sum it up shortly, it is a conveyance of property from one person to another, for money, or what is, according to the provisions of the statute, equivalent to money. What is that except a conveyance on sale? What else can you call it? It is certainly not a gift; it is not an exchange; it is not a partition; it is not a mortgage. I do not know what it is unless it is a conveyance on sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or for the purposes of the Stamp Act, for stock or marketable securities.

But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial.

Again it is argued on behalf of the appellants that this instrument is in substance nothing more than a conveyance to a trustee to carry on the business in trust for the grantor. Just try that. Supposing there is a conveyance by half-a-dozen people, transferring their property to a trustee on trust to carry on the business for them, can you in any sense of the word, legal or business-like, or otherwise, call that trustee a buyer? There is no buying, there is no sale to him at all, nor is there any money, or stock, or securities, or anything else parted with by him. Then it was urged that these shares can derive no value unless the company gets this property transferred to them. That is possible enough. That is to say, in other words, that the shares in the company would be valueless unless the company had assets. Of course they would be, but that does not affect the question whether there is a sale or a conveyance or not. I think myself that CAVE, J., has attached too little importance to the fact that you have here a distinct seller, and a distinct buyer, and that in point of law it is immaterial that in the present case the buyer is a corporation which consists of the eight persons who formed, and who are, the partners. The appeal must be allowed.

KAY, L. J. I am of the same opinion. With deference to CAVE, J., it seems to me impossible to hold that this transaction was anything else than a conveyance on sale. As pointed out on the face of the statute, the consideration may be money or money's worth. Money's worth certainly is sufficiently expressed by a number of shares and debentures of an existing corporation, which, in effect, constituted the consideration for the particular transfer in this case. Now, that there was a conveyance is beyond all question. The persons who are named as vendors in the deed have divested themselves of their property in the subject of that conveyance, and all that property is vested in an entirely

independent and separate body, - namely, a corporation. Suppose that corporation had consisted of altogether different persons, no one for a moment would doubt that this was a conveyance on sale. Suppose there had been one person in it different, there is nothing that I have heard in the argument which induces me to suppose that even in that case it could have been doubted that this was a conveyance on sale. But the argument, as I understand it, is this, - that the individual corporators who composed that corporation were, in fact, the very identical persons who were conveying this property to the corporation, and the corporation had no other property except this which it took under its conveyance; and that, as the only value of the shares and debentures was derived from this very property which the individual corporators were conveying to the corporation, the conveying partners either got no consideration for that which they conveved other than part of the property actually conveyed, or they got no consideration at all. Now, I do not follow that argument in the least. I think it is a fallacy from beginning to end. In the first place, a corporation is a different thing from the individuals who compose it; and, secondly, the shares and debentures of a corporation are not the same thing as the property which that corporation owns. You may say, in one sense, that the property is a security for the value of those shares. The value of those shares in the market, which observe are immediately transferable, may depend upon the solvency of the company, the amount of property it possesses, and its chance of carrying on a profitable business. To say that the shares and debentures are part of that property seems to me to be a complete confusion of terms. Suppose the case, which I put during the argument, of a sale of real estate, and the whole of the purchase-money not to be paid at once in cash, but to be secured on mortgage on that real estate; and, if you like, in order to make the analogy perfect, suppose the purchaser had no other property than that property, would the transaction be the less a sale for that reason? Still the consideration given would be a certain amount of cash which would be left on the security of the estate; but I have never yet heard that because the whole of the purchase-money upon a sale of real estate was left on mortgage of the real estate, that for that reason the transaction ceased to be, or was prevented from being, a sale. Yet, really, that is what the argument in this case comes to. I confess I am not able to agree with it. Nothing else was suggested which should prevent this transaction from being a sale, and it seems to me clearly to be, under the words of this statute, "a conveyance on sale" for a consideration, which, if not money, at least is money's worth. I, therefore, with all deference to CAVE, J., think that his decision must be reversed, and the appeal allowed.

A. L. SMITH, L. J. The question in this case is whether the instrument of November 27, 1891, is a conveyance or transfer on sale of any of the property mentioned under the second head—"conveyance or transfer"—in the schedule to the Stamp Act of 1870.

Now, in order to find out what is, or is not, a conveyance or transfer on sale of any property in that second head of the schedule, I must refer to ss. 70 and 71 of the Act. And, reading both these sections together, it seems to me that the term "conveyance on sale" includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser in consideration of any stock or marketable security. That is the definition.

First of all, then, is this an instrument whereby any property is transferred to or vested in the purchaser? I beg to say, Yes. It is an instrument upon the face of which the actual land of the vendors, and the trade-marks which are their property, are transferred to a limited company. I do not think that this is disputed, and it does not appear to me to be disputed so far, in the judgment of my brother CAVE; but what he says is that this is not an instrument whereby any property, upon the sale thereof, is transferred. The real pith of his judgment is that the vendors and vendees are the same persons — that the agreement as regards the sale was carried out by the members of the old firm before any company limited came into existence, and that inasmuch as they are the same persons now as then, there is no sale at all; and, therefore, there is no instrument whereby any property upon the sale thereof is transferred. I must here respectfully differ with my brother CAVE. It seems to me that the company limited are not the same persons as the eight members of the old firm — they are different altogether. It was admitted by Mr. Finlay in argument, though he entirely took away the ground from under my brother Cave's feet when he said so, that the company limited could maintain a suit for specific performance against the old partners. If that is so, how can they be the same persons? This really shews that they are not the same persons. It is here that I disagree with my brother CAVE.

The respondents also contend that there was no consideration. must read the two sections together. Sect. 70 enacts that: "The term 'conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser." Then s. 71 implies that it may be in consideration of any stock or marketable security. The land and the trade-marks are transferred . by this instrument from the eight partners who were the old firm to the new company limited. The land and trade-marks are transferred by this instrument in consideration of what? In consideration of stock or marketable securities, which, undoubtedly, are not the same things as the land and trade-marks themselves, though they may be charges upon the land and trade-marks which are conveyed. It seems to me that it is untrue to say that in this transaction there has been no consideration passing from the vendee to the vendor. Although charges upon the land and the trade-marks, the consideration comes within the very terms of s. 71 itself, — "any stock or marketable security."

For these reasons, I prefer the judgment of my brother WRIGHT to that of my brother Cave.

Appeal allowed.

MOORE & HANDLEY HARDWARE CO. v. TOWERS HARDWARE CO.

·1888. 87 Alabama, 206.1

APPEAL from the Chancery Court of Jefferson.

Bill filed Dec. 3, 1888, by Towers Hardware Co., a private corporation, against Moore & Handley Hardware Co., another private corporation, seeking to enjoin defendant company from selling "plow-stocks and plow-blades" in violation of a contract made between plaintiff company and a partnership doing business under the name of Moore, Moore & Handley, which was composed of James D. Moore, Benj. F. Moore, and William A. Handley, who, as the bill alleged, afterwards formed the defendant corporation. The allegations of the bill were, in substance, as follows: Said partnership, May 27, 1887, sold out to plaintiff their entire stock of plow-stocks and plow-blades; signing an agreement - " we agree not to handle any more plow-stocks or plow-blades, except railroad plows." On March 12, 1888, the defendant company was incorporated under the general statutes. The said partners each subscribed one-fourth of the capital stock, and one Wimberly one-If Wimberly ever had any interest in the corporation, he had not had it since Aug. 8, 1888. Said Moores and Handley are now the sole owners. The defendant corporation was organized for the purpose of carrying on the same business which the partnership had carried on. Its capital stock was paid for wholly in the assets of said partnership. It succeeded to all the property rights and assets of said partnership, as well as all the liabilities thereof. Said defendant corporation is none other than said J. D. Moore, B. F. Moore, and Wm. A. Handley, who constituted said partnership, and now constitute said corporation. "Your orator cannot say whether or not said Moores and Handley organized said corporation for the purpose of evading the force and effect of their said agreement with your orator, but does say and charge that the effect of their doing so would be to perpetrate a fraud on your orator, if they should be allowed to handle plow-blades and plow-stocks; that the defendant's business, as now conducted, is identically the same as that conducted by said Moores and Handley, is conducted by the same persons, and in substantially the same manner as before, and that the only change in fact has been in the name of the concern.

The defendant corporation answered the bill; denying that it assumed, or became liable for, the obligations of said partnership, or of its individual partners, or that it acquired any interest in the outstanding notes and accounts due to said partnership, or the real estate owned by the partners, which was more than sufficient to pay all their out-

¹ Statement abridged. Arguments, and part of opinion, omitted. — Ed.

standing debts and liabilities; alleging that Wimberly owned a one-fourth interest in the corporation at its organization, and for some time acted as its treasurer, but admitting that the Moores and Handley had since bought out his interest; and demurring to the bill for want of equity.

After answer filed, defendant moved to dissolve the temporary injunction and to dismiss the bill; and this appeal is taken from the decree of the Chancellor refusing these motions.

Smith & Lowe, for appellant. Cabaniss & Weakley, contra.

McClellan, J. The equity of the bill, so far as the injunction is concerned, and the sufficiency of those of its allegations which are not denied by the answer to sustain the injunction depend, primarily, on two questions. First, whether the contract relied on is void, as being in unreasonable restraint of trade; and, second, whether a negative undertaking entered into by persons who subsequently organize, and for the time constitute a corporation for the prosecution of the business with respect to which the contract was made, can be enforced by injunction against the corporation.

1. [The learned Judge held that the contract was not void, as being in unreasonable restraint of trade.]

2. The general doctrine is well established, and obtains both at law and in equity, that a corporation is a distinct entity, to be considered separate and apart from the individuals who compose it, and is not to be affected by the personal rights and obligations and transactions of its stockholders, and this whether said rights accrued or obligations were incurred before or subsequent to incorporation. 1 Mor. Priv. Corp. §§ 227-234, 547-549; Morrison v. Mining Co., 52 Cal. 309; Hawkins v. Mining Co., Id. 515; Gent v. Insurance Co., 107 Ill. 658; Railroad Co. v. Helensburgh, 2 Macq. 391; Match Co. v. Hapgood, 141 Mass. 145. 7 N. E. Rep. 22. There is a class of contracts, however, which are entered into between the promoters or projectors of a contemplated corporation and third persons on the faith of the corporation, intended to inure to its benefit, and which in point of fact do inure to its benefit, on which the corporation will be charged, even in the absence of an express promise to perform, or ratification on the part of the company after it is in esse, on "the familiar principle that one who adopts the benefit of a contract which another volunteers to perform in his name and on his behalf is bound to take the burden with the benefit." 1 Redf. R. R. (5th ed.) 18; Edwards v. Railroad Co., 1 Mylne & C. 650; Stanley v. Railway Co., 9 Sim. 264; Little Rock & F. S. R. Co. v. Perry, 37 Ark. 164: Perry v. Little Rock & F. S. R. Co., 44 Ark. 383; Bommer v. Manufacturing Co., 81 N. Y. 468. And in those cases where associates combine together to create a paper corporation to cover a partnership or joint venture, and where the stockholders are partners in intention, and have resorted to the fiction of separate corporate entity to free themselves from individual obligations which had

attached to them, with respect to the business they propose to carry on, prior to the organization of the company, courts of equity, when the ends of justice require it, will disregard and look beyond the fiction of corporate entity, and hold the corporation to a discharge of the liabilities resting on its members; and this may be done although some of the shareholders had not originally incurred the obligation sought to be enforced, provided they had notice of it before entering the corporation and participated in the effort to avoid it. Wheel Co. v. Wagon Co., 20 Fed. Rep. 700; Beal v. Chase, 31 Mich. 490, 495, 532.

The contract of Moore, Moore & Handley, sought to be enforced against the Moore & Handley Hardware Company, was not an undertaking between promoters of the company and third parties, nor made on the faith of the corporation, nor intended to inure to its benefit, nor did it inure, in point of fact, to the benefit of the corporation. It is not of that class of contracts which courts enforce against corporations on the grounds that they were made in the corporate name by anticipation, and that the corporation received and accepted the benefits result. ing from them. There is no allegation of fraud made against the corporation or its shareholders, and the implication of the fraudulent effect of the corporate action complained of is denied. It is not shown that this is a mere "paper corporation" to cover a joint venture in which the corporators are partners in intention, and have resorted to this form for the purpose of evading and avoiding obligations which they had taken upon themselves as individuals, or for the purpose of evading the promise relied on here. If these things had appeared in the case we should not hesitate to hold the corporation answerable for the individual obligation. But in the absence of fraud "no authorities have gone the length of holding that any contract made with individuals exclusively upon individual credit will become the contract of any future corporation that may form for the more convenient management and use of the benefits of it." Little Rock & F. S. R. Co. Cases, supra. case of Beal v. Chase, supra, goes beyond this doctrine, we cannot indorse it. We do not think it does. In that case the corporation had been formed for the purpose of violating a contract not to engage in a certain business. All the corporators were held to have participated in this purpose. The business was to be conducted by the corporation in connection with the promisor in his individual capacity. He had an interest in it, both individually and as the principal shareholder of the company; and the court enjoined the corporation, not generally, but from carrying on the business with or for the individual contracting party. To put the case at bar in line with that case it would have to appear, not only that the corporation organized for the purpose and with the intention of evading their contract through the separate entity of corporate existence, but also that they reserved an interest in the business distinct from their interests as stockholders. None of these facts are shown. The effect of allowing the injunction in this case to continue would necessarily be to hold all future shareholders in the corporation to the performance of a contract which neither they nor the corporation had ever entered into, and of which they may not even have had notice. Such a result could only be justified on the ground of bad faith in the creation of the company. To thus hamper a bona fide corporation would be inequitable, and have the effect of establishing a doctrine fraught with much danger to corporate rights, powers, and property.

The allegations going to show a ratification by the corporation of this contract of Moore, Moore & Handley are denied by the answer, and hence cannot be considered in passing on the decree overruling the motion to dissolve the injunction. Those allegations of the bill which are not denied were not sufficient to authorize a continuance of the injunction, and the decree on that point was erroneous, and is reversed. The contract relied on here is such a one as the respondent corporation could have made under its charter. It is therefore one which, being already in existence between complainant and the individuals composing the defendant company, the corporation had the power to ratify and adopt. The bill, in our judgment, sufficiently avers such ratification or adoption. These allegations give equity to the bill, and the decree overruling the demurrer is affirmed. The cause will be remanded, with instructions to the chancellor to dissolve the injunction, anless the complainant amends its bill so as to entitle it to a continuance of the writ, under the principles we have announced.

Reversed and remanded.

WARREN v. DAVENPORT FIRE INSURANCE CO.

1871. 31 Iowa, 464.1

ACTION on a policy of insurance, issued by defendant on alleged property of Goodale & Hosford, payable, in case of loss, to plaintiffs, who are creditors of G. & H.

Petition averred that defendant insured Goodale & Hosford against loss by fire, to the amount of \$2,500, "on their private stock contained in a one story frame saw-mill, machinery, fixed and movable, engine and boilers therein, and known as that of the Dubuque Lumber Company"—loss, if any, payable to the plaintiffs. Petition also averred that Dubuque Lumber Co. was and still is a corporation; that by the "private stock" before mentioned was meant the capital stock which G. & H. then had and still have in the corporation, all of which was known to defendant's agent at time of insurance; that by means of such stock said G. & H. had, and continued to have, an interest in

¹ Statement abridged. - ED.

the insured property, viz. in said saw-mill, machinery, &c., to an amount exceeding \$2,500 over and above so much of their interest therein as was covered by an insurance of \$15,000, effected by the corporation in its corporate name; that plaintiffs are creditors of G. & H. to a large amount, and hold the certificates for a considerable amount of the stock of said corporation as security; and that the insurance was effected with the full knowledge and consent of the lumber company.

Attached to the petition was a copy of the policy, stipulating that "the loss or damage is to be estimated according to the true and actual cash value of the property at the time the same shall happen and be paid."

To this petition defendant demurred: first, because it does not show that plaintiffs have any interest in the property destroyed or in the policy; second, because it does not show that Goodale & Hosford had any insurable interest in the property insured at the time the insurance was effected by them.

The demurrer was sustained in the District Court. Plaintiffs appealed.

Cotton & Cross, for appellants.

W. E. Leffingwell, for appellee.

MILLER, J. The question raised by the demurrer is, whether the parties effecting the insurance in this case had an *insurable interest* in the property insured at the time the risk was taken and at the time of loss by fire.

Policies of insurance founded upon mere hope and expectation, and without some interest, are said to be objectionable as a species of gaming, and so have been called wager policies. These policies were expressly prohibited in England by statute of George II., ch. 37, and they have been adjudged illegal and void in this country upon the principles of that statute. Angell on Fire & Life Ins., §§ 18, 55. It is not that wager policies are without consideration or unequal between the parties that they are held void, but because they are contrary to public policy. Policies of fire insurance, without interest, are peculiarly and extremely hazardous by reason of the temptation they hold out to the commission of arson by the party assured, which is necessarily attended with peril of the most deplorable kind to a whole neighborhood. In King v. State Mutual Fire Ins. Co., 7 Cush. (Mass.) 10. Mr. Chief Justice Shaw says: "If an insurance were made on a subject in which the assured has no pecuniary interest - although in other respects he may be deeply concerned in it and on that ground be willing to pay a fair premium - made with full knowledge of all the circumstances, by both parties, without coercion or fraud, we cannot perceive why it would not be valid as between the parties. But upon the strong objections, on grounds of public policy, to all gaming contracts, and especially to contracts which would create a temptation to destroy life or property, such policies without interest are justly held void." Upon the ground of public policy, therefore, if the assured have no interest in the thing insured, the policy must be held void. This is well settled. On the other hand it is equally well settled that not only the absolute owner, but any one having a qualified interest in the property insured, or even any reasonable expectation of profit or advantage to be derived from it, may be the subject of insurance and especially if it be founded in some legal or equitable title. Id. § 56. And the general doctrine that any interest in the subject-matter insured is sufficient to sustain an insurance upon real property is one which has been fully sustained. Id. § 57, and notes. Several persons owning different interests in the same property may insure their several interests. And it is not material whether the interest assured be legal or equitable. Any interest which would be recognized by a court of law or equity is an insurable interest.

The interest of a cestui que trust, mortgagor, mortgagee, of a lender or borrower on bottomry, so far as regards the surplus value, or of a captor, or of one entitled to freight or commission, is insurable. So where a lessor on ground rent has entered for the arrears, under a covenant that he may hold until the arrears are paid, &c., has an insurable interest. So also in case of one in possession of land by disseisin. Angell on Fire and Life Ins., §§ 57, 58, 59; 2 Parsons on Cont., § 2 of ch. 14, commencing on p. 438, and cases cited; 2 Greenlf. on Ev., § 379.

The term interest, as used in application to the right to insure, does not necessarily imply property (Hancock v. Fishing Insurance Co., 3 Sumner's C. C. 132; Angell on Life and Fire Ins., § 56), and as the contract of insurance is one of indemnity, against losses and disadvantages, an insurable interest may be proved in the assured, without the evidence of any legal or equitable title in the property. Putnam v. Mercantile Insurance Co., 5 Metc. 386; Lazarus v. The Commonwealth Insurance Co., 19 Pick. 81, 98. An "insurable interest" is sui generis, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or jus in re, or jus ad rem. Yet such a connection must be established between the subjectmatter insured, and the party in whose behalf the insurance has been effected, as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of the injury to it. Buck v. Chesapeake Insurance Co., 1 Pet. 163.

In the case under consideration the assured were stockholders in the Dubuque Lumber Co., a corporation for pecuniary profit. The property destroyed belonged to the corporation. The insurance was upon the interest which the assured had in that property by virtue of the capital stock therein owned by them.

The object of the insurance was to indemnify the assured against loss to them in the event of a destruction of the property by fire. Could or would they sustain loss in such event? How would their interest be affected? It seems to us to be beyond controversy, that, in

case of the destruction of the corporate property by fire, the stockholders sustain loss to a greater or less extent, dependent on the par-Suppose the case of a grain elevator upon ticular circumstances. some of our numerous railroad lines, built, owned and managed by a joint-stock corporation; that this is the only property of the corporation; that the entire capital stock is represented in and by this property; that, in consequence of the profitable nature of the business. large dividends are realized by the stockholders, and the stock is above par in the market. The destruction of this property by fire would at once result in the loss of dividends to the stockholders and a destruction of the value of the stock, or at least to its reduction to a nominal value. The entire property, representing the whole capital of the corporation, being destroyed, it is difficult to perceive what would give any value to the stock. It is true that, primarily, the loss is that of the corporation, and hence it may insure, but the corpora-/ tion may refuse to insure, and then the real and actual loss falls on the stockholders.

The appellee argues that shares of stock in a corporation are choses in action, and are not considered to be an interest in the real property of the company, and cites numerous authorities to sustain this position. This may be admitted without denying the shareholders' "insurable interest" in the property of the corporation. A mortgage, also, is but a chose in action. The mortgagee acquires no right to the mortgaged property which can be attached, levied on under a general execution, or that can be inherited. It is a mere security for a debt-Eaton v. Whiting, 3 Pick. 484; Smith v. People's Bank, 11 Shep. (Me.) 185; Abbott v. Mutual Fire Ins. Co., 17 id. 414; Middleton Savings Bank v. Dubuque, 15 Iowa, 394; Newman v. De Lorimer, 19 id. 244; Baldwin v. Thompson, 15 id. 504; Burton v. Hintrager, 18 id. 348; Hilliard on Mort. 215.

And yet the cases are uniform to the effect that a mortgagee of real property has an insurable interest therein which he may insure on his own account, but that when he does so it is but an insurance of his debt. Eaton v. Whiting, supra. And in case of damage by fire to the premises before payment of the mortgage, his loss, if any, is that his security has been impaired or lost. His interest is but a chose in action in the nature of a security, which he may insure, so that in case of destruction of or damage to the property upon which his security rests, he will be indemnified for the loss he actually sustains. So, also, it seems to us that the owner of stock in a corporation for pecuniary profit has a like interest in the corporate property. A mortgagee of real property has an insurable interest in the mortgaged premises, based upon the interest he has in the preservation of the same as security for a debt. He has a legal right to contract for indemnity against injury to the value of his security.

Upon precisely the same principle a stockholder may contract for indemnity against injury to the value of his stock, for he also has an

Interest in the preservation of the corporate property from destruction by fire; and in its destruction he sustains loss in so far as the value of his stock is depreciated in consequence thereof, or his dividends cut off.

The argument that, if this is allowed, owners of stock worth not more than ten per cent upon its nominal value may be insured at its par value, and in case of loss by fire such par value of the stock recovered from the insurer seems to us to be unsound. Without entering into a discussion in detail of what would be the exact measure of recovery in such case, we simply answer that no more than the actual loss sustained is in any case recoverable. This rule is well established, and rests upon just principles. See Angell on Fire and Life Ins., ch. 11, and cases cited in notes.

The question under consideration has not received direct judicial determination in any of the States, so far as we have been able to The case of Phillips v. Knox County Ins. Co., 20 Ohio, 174, is cited and claimed as an authority against the right of a stockholder to insure. The decision in that case, as a careful examination of the same fully shows, was made entirely upon a construction of the charter of the insurance company, which gave a lien on the insured property, including the land on which the buildings stand. By the charter a sale of the insured property rendered the policy void, and the ninth section declared, that if the insured have a less estate than an unincumbered title in fee simple to the buildings insured and the lands covered by the same, the policy shall be void, unless the true title of the insured and the incumbrances be expressed in the policy and the application therefor. The plaintiff insured as owner of the property, which in fact belonged to a corporation of which he was a stockholder, and the court held that, "where a building and the land on which it stands is the property of an incorporated company, the stockholders could not, under the provisions of the defendant's charter, insure such property as their individual property in the defendant's company."

Under the charter of that company, a mortgagee even, insuring the property as his own, would likewise be defeated in a recovery. So the owner in fee simple could not recover if the property was incumbered and the incumbrance not set forth in the policy. And of course the same result must follow where a stockholder insures corporate property as his own individual property. The decision in that case goes no further than this, and is no authority in support of the proposition, that a stockholder has no insurable interest in the property of the company, and, hence, has no bearing upon the question before us.

The judgment of the district court is

Reversed.

FAIRFIELD COUNTY TURNPIKE CO. v. THORP-

1839. 13 Conn. 173.1

Assumpsit on stock subscription. Defendant offered to prove an admission made by one Hickok, a stockholder in the plaintiff corporation. The evidence was excluded. Verdict for plaintiff. Motion for a new trial.

Dutton, for defendant.

Bissell and Booth, for plaintiff.

WILLIAMS, C. J. . . . It is claimed, that Hickok being a stockholder in the company, his declarations are admissible as the confessions of a party. That the confessions of the party on the record may be given in evidence, is certainly true. Testimony of this kind proceeds upon the ground that it is not to be presumed that persons will admit anything against their interests. There are cases, however, where the party on the record has really no interest, or at most a mere nominal interest; as where a person has assigned a note without recourse; where a partnership is dissolved, and one is to discharge the debts, &c.; in which cases, this evidence is admitted, but with reluctance. In New-York it has been held, that the admissions of partners after a dissolution, cannot be given in evidence against a co-partner, except to prevent the operation of the statute of limitations. Hopkins v. Bank. 7 Cow. 650, 653; Gleason & al. v. Clark, admr. 9 Cow. 57; Hackley v. Patrick & al. 3 Johns. Rep. 536. We have adhered to the English rule in admitting the evidence, although in certain cases holding that it was entitled to no weight. Coit v. Tracy, 9 Conn. Rep. 1, 8 Conn. Rep. 268, 277. It becomes important to inquire, in this case, whether Hickok is a party upon the record. It he is, then any single shareholder in a bank of any amount of capital is a party to any suit brought by the bank, and his declarations are admissible. Whatever may be said as to the shareholders in corporations being parties in fact or parties in interest, it is certain they are not parties upon the record. The record speaks only of the artificial, intangible, being created by the act of incorporation. In corporations of this character, it speaks of and knows no individual. There are cases, however, in which courts have drawn aside the veil and looked at the character of the individual corporators; particularly when the question arises as to the jurisdiction of the court. This has been done by the supreme court of the United States the better to carry into effect the spirit of the constitution, giving the courts of the United States jurisdiction in suits between inhabitants. Bank of the United States v. Deveaux, 5 Cranch, 91, 2. But this is confined to the question of jurisdiction, and has never been

 $^{^1}$ Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to one point. — Ed.

extended further. Bank of Augusta v. Earle, 13 Pet. 586. So, too, this court has holden, that a judge shall not sit who is within the prohibited degrees of relationship to a member of a corporation; and this to carry into effect the spirit of the act and to prevent any suspicion of partiality. These cases, however, rather form exceptions to the rule than create a new one. We see nothing in the case before us which ought to induce the court to extend the rule of law beyond its letter. On the other hand, there are strong objections to this evidence. first results from the nature of the evidence itself. For although the declarations of the party in interest against his interest, if fairly represented, are strong evidence against him; yet there is so much suspicion often attached to it from the misapprehension of the hearer and the treachery of memory in the reporter, to say nothing of the danger arising from a prejudiced mind, that it is often to be received with many grains of allowance. In cases of this kind the interest is frequently so minute as to create no presumption, or a very slight one, that the person would not make such a declaration because against his interest. On the contrary, many circumstances too minute for explanation, might lead to a bias much stronger than such pecuniary interest. Every day's experience will shew us that the prejudices and alienations which arise in the intercourse of business, entirely overpower the slight interest of small shareholders; and although this would be no reason for excluding evidence clearly admissible, yet it may be proper, in considering whether evidence excluded by the letter of the rule is within its spirit. Besides, the knowledge of individual stockholders is generally so limited as to make it of no importance.

It is said, however, that all these are proper considerations for the jury to weigh. But when we consider the surprise upon the real party from testimony of this kind from unexpected quarters, which must frequently happen, and the embarrassments occasioned thereby, the multitude of collateral inquiries which might often arise in investigating the real connexion of the persons whose admissions are offered in evidence, and the delay attending such inquiries, it seems to us that such evidence would more often mislead than guide to truth. It seems to be supposed, that because the individual stockholder cannot be compelled to testify, his declarations therefore are admissible; but it does not follow that the declarations of any person who cannot be compelled to testify on account of his interest are admissible as evidence. the case of bail, of a feme covert, of a person who, by his answer. might subject himself to a penalty or a debt; their declarations are not admissible as a matter of course. In such cases, perhaps a court of chancery, upon proper application, might compel a disclosure. Then there would be no surprise; and such terms might be imposed as would render it safe. We know that in England it has been decided by the court of King's Bench, that the admissions of a rated parishioner may be evidence in a suit by the inhabitants of the parish. It seems to have been thus first decided upon the ground that it was in fact a suit

against the inhabitants themselves. The King v. Inhabitants of Hardwick, 11 East, 578, 586. There the suit is, in name as well as in fact, against the inhabitants; and the property of the individuals is liable to be taken in execution. McLoud v. Selby, 10 Conn. Rep. 395. And in a case but two years before, Lord Ellenborough held, that in an action by a corporation, what any individual said [referring to individual corporators] could not be given in evidence, although he did not extend the rule to the declarations of a public officer of the corporation. The Mayor of London v. Long, 1 Campb. 22. Before either of these cases, our superior court had decided that the declarations of an individual member of a corporation, even although he was an officer in it, could not be given in evidence. Hartford Bank v. Hart, 3 Day, 494. That decision has ever since been acquiesced in; and it is by the supreme court of New York favourably contrasted with the English decisions. Osgood v. Manhattan Bank, 3 Cowen, 623. And upon a careful review, we are not disposed to question the propriety of what has long been considered our settled practice. In the state of Maine, too, a similar decision has been made. Polleys v. Ocean Insurance Company, 2 Shep. 141.

New trial not to be granted.

WASHINGTON INSURANCE CO. v. PRICE.

1823. 1 Hopkins, N. Y. Chancery Reports, 1.

[Before Sanford, Chancellor.]

This cause being noticed for hearing, the chancellor informed the counsel of the parties that he was a stockholder in the Washington Insurance Company, and that according to the opinion which he then entertained, he could not hear the cause: but he expressed a desire that the question, whether he ought to act as judge in the cause or not, should be argued. The counsel declined to argue the question, and the chancellor this day gave his opinion.

The sole judge of this court, being a stockholder in the incorporated company which institutes this suit, can he proceed or act as judge in the cause?

It is a maxim of every code, in every country, that no man should be judge in his own cause. . . .

But it has been said, that where a court consisting of a single judge, has exclusive jurisdiction of the subject of a suit, a failure of justice would take place if the judge should not act in his own cause.

A failure of justice may take place if he should not act; as it also may occur if he should decide his own cause: but it belongs to the power which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not entrusted with authority to determine his own rights or his own wrongs.

By the third section of the act concerning the court of chancery, it is provided, "That where the chancellor shall be a party to a suit in chancery, the bill shall be filed before the chief Justice of the state, who shall thereupon proceed, in like manner, as the chancellor could of right do, as a court of chancery in other cases, and the court of chancery shall be thereupon held in that case before the chief Justice, and shall proceed to hear and determine the same, according to the course and usage of the said court."

In this case, an incorporated company sues by its corporate name. The company consists of persons who are joint proprietors of a common fund in various amounts; the suit is the act of these persons or their officers; and the gain or loss which may result from it will be the gain or loss of each stockholder, according to the extent of his interest in the fund. The corporation is the party in form; the stockholders are the parties in substance. When a corporation is thus a party to a suit, it is regarded as one sole party, so long as it is not necessary to the ends of justice that the persons who use the corporate name should be disclosed. But whenever the ends of justice require that the persons who use the name of a corporation should be known, the inquiry is made, and the stockholders and their officers are considered and treated as they are in fact, the real litigants in the suit.

[The learned Chancellor then discusses the meaning of the term "party" in the statute, and concludes that the provision] extends to all cases in which the chancellor is a party to a suit, and, as I conceive, to all cases in which, though neither complainant nor defendant, he is a real party to the subject of litigation.

Such is my own view of this question; but it appears that my immediate predecessor, and the late chief Justice, held a different opin-Their opinion is found in the case of Stewart v. The Mechanics and Farmers' Bank, 19 John. 501. In that case, the chancellor was a stockholder in the bank; and this fact appearing, the parties consented that the hearing of the cause should proceed. Upon a consultation between the chancellor and the chief Justice, they were both of opinion that the chancellor was not a party to the suit within the provision of the statute; and the chancellor proceeded to determine the The same cause was removed to the court of errors; but this question was not raised or considered in that court. It is a question which has not been determined by the court of errors; but it has been decided by the opinions of two of our most eminent judges. I have the highest respect for the late chancellor, and the late chief Justice. I delight to honor them for the ability, intelligence, and integrity with which they discharged their respective trusts; and I feel that I have strong authority, when I am able to produce their opinions in support of my own decisions. But where my own judgment is clear and undoubting, I cannot surrender it to any opinion except

that of a superior tribunal.

My opinion is, that the chancellor is a party to a suit in this court by or against a corporate company, in which he is a stockholder; that such a suit is his own cause, to the extent of his interest as a stockholder; and that he cannot determine such a suit. I am also of opinion, that the chief Justice has jurisdiction of such suits; and the circuit courts are now also open as courts of equity.

This suit having been instituted before I was chancellor, I merely direct at present, that all proceedings in it before me cease. If the suit shall proceed before the chief Justice, it will be determined, as if it had been commenced before him, according to the statute.

SECTION II.

The Distinction as applied to Questions of Taxation.

PEOPLE EX REL. UNION TRUST CO. v. COLEMAN.

1891. 126 New York, 433.1

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of October, 1890, which affirmed an order of Special Term dismissing a writ of certiorari to review an assessment of the relator's capital for the year 1889.

The relator is a corporation organized under a special act of the legislature of 1864 (Chap. 316, Laws of 1864), doing business as a trust company in the city of New York. On the second Monday in January, 1889, it furnished to the commissioners of taxes and assessment a detailed statement of its assets and liabilities which was duly sworn to, and claimed that all its capital stock and surplus, being invested in United States securities, was exempt. The commissioners held that the capital stock, the actual value of which they were to assess, was the shares and they ascertained such value by multiplying the nominal capital by the market price of the shares and deducted therefrom ten per cent of the nominal capital, the assessed value of the real estate and the investments in United States securities.

Wheeler H. Peckham, for appellant.

D. J. Dean, for respondents.

Finch, J. The relator has been assessed upon an "actual value" of its capital stock derived entirely from the market value of its shares. These are selling at the large premium of something over

¹ Arguments and part of opinion omitted. - ED.

five hundred dollars for each share of one hundred dollars, and the assessors have concededly taken that valuation, or the principal part thereof, as the "actual value" of the company's stock liable to taxation, instead of its own proved and established value. The relator challenges the assessment, and through all the proceeding has persistently raised and pressed the inquiry, not so much as to the mode or manner of ascertaining value, but rather as to what is the precise thing to be valued, whether the capital stock of the company or the capital stock held in shares by the corporators. If these are the same, or, in any just sense, equivalents, either might be valued without substantial error, but if they are not such, we must determine which is to be valued before we can solve the problem of how to value it.

Now, it is certain that the two things are neither identical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in eash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the company's capital stock, and, therefore, is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition. So that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share stock covers, embraces, represents all three in their totality, for it is a business photograph of all the corporate possessions and possibilities. A company also may have no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share

stock, strengthened by hope of the future and the support of earnings, may be worth its par, or even more. And thus the two things—the company's capital stock and the shareholder's capital stock—are essentially and in every material respect different. They differ in their character, in their elements, in their ownership and in their values. How important and vital the difference is, became evident in the effort by the state authorities to tax the property of the national banks. The effort failed, and yet the share stock in the ownership of individuals was held to be taxable as against them. The corporation and its property were shielded, but the shareholders and their property were taxed.

Now some degree of confusion and trouble have come in because these two different things are denominated alike capital stock, making the expression sometimes ambiguous. It is the important and decisive phrase in the law of 1857, under which the assessment here resisted was made, and requires of us to determine at the outset in which sense it was used. The section reads thus: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll, or shall have been exempted by law, together with its surplus profits or reserve funds exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value and taxed in the same manner as the other real and personal estate of the county."

There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor in its safety. One ample reason is derived from the fact that the tax is assessed against the corporation and upon its property, and not against the shareholders, and so upon their property. In theory every tax is charged against some person, natural or artificial, resident or non-resident, known or unknown. It is assessed not upon property irrespective of ownership but against persons in respect to their property (23 N. Y. 215), and affects not merely a lien, but also a personal liability. On the assessment-rolls in this case appeared the name of the relator as the person assessed, and the amount of the tax became a charge against it. Of course it could only be assessed and taxed in respect to its own property, that which in its corporate character it owned and possessed, and so it follows inevitably that the statute concerns the company's capital stock, that is its real and actual capital, and not in any respect the share stock which it does not own and whose possessors have not been assessed.

Another reason is found in those terms of the statute which include and exclude respectively specific kinds or classes of property in the

corporate ownership. Thus the assessment is to be laid not merely upon the capital stock of the corporation, but also upon its surplus. No such explicit direction was necessary, except upon the assumption that by the words "capital stock" was meant simply "capital," which would not include surplus, and so required that it be subjected by name to the valuation. If the share stock was meant its value would include surplus and make its specification not only needless but confusing. But while the statute includes surplus by specific mention, it excludes franchise by omitting it. The omission of franchise is emphasized by the careful inclusion of surplus. It is fully and definitely settled that the tax imposed by the statute is not upon franchise. (People v. Comrs. of Taxes, 2 Black, 620.) But if that be so, it is not upon the share stock, for that represents the value of the corporate franchise as a part of the total of the corporate property. And so, both by what it specifically includes and silently excludes, the statute itself informs us that by "capital stock" it means and intends the company's actual capital paid in and possessed, and not at all or in any sense the share stock.

The same thing becomes apparent from a study of the whole line of legislation which culminated in the law of 1857. It was traced in detail upon the argument with great industry and wealth of illustration. We have verified it by travelling over the same track, and without taking pains to reproduce it, may assert the general result which it discloses and select out one or more illustrations. The investigation shows that the word "capital" and the phrase "capital stock" are used interchangeably and synonymously, and where the latter phrase occurs there is almost always something in the statute which stamps and labels it as referring to the actual capital of the company. Thus the law of 1825 (Chap. 262), after providing for the taxation of all persons owning or possessing property, proceeds to declare that corporations shall be deemed persons for the purposes of the act, and requires them to furnish a statement of the amount of "capital" actually paid in; and then, referring to turnpike and bridge companies, requires them to state "the amount of capital stock actually paid in or secured to be paid in." Both clauses refer to the same assets or fund, naming it indiscriminately "capital" and "capital stock." Again, in the law of 1825 (Chap. 254) the assessors, after putting the corporation by name on the assessment-roll, are required to add the amount "of its capital stock paid in or secured to be paid in," and to designate how much of it is in real and how much in personal property, and so no doubt is left that by "capital stock" was meant simply the "capital" possessed in cash or invested in securities or

The illustrations might be multiplied and fortified by reference to numerous acts relating to the formation or management of manufacturing, railroad, business and telegraph companies in which the two forms of expression are used indiscriminately and as convertible terms; but I think quite enough has been said to require unhesitating assent to the proposition that, under the law of 1857, the thing to be taxed is the capital of the company and not the shares of the stockholders.

Indeed, I should feel bound to apologize for arguing what seems to me so simple and plain a proposition, were it not for the fact that it has been largely ignored by assessors and not always clearly kept in mind by the courts, and but for the further fact that the right to adopt as the taxable valuation the value of the shares, totally disregarding the value of the company's capital, has been asserted in this case, maintained by the courts below, and claimed to be fully justified by very much which we ourselves have decided or said.

Before examining the cases in detail to see whether they hamper our freedom of judgment upon the question presented. I think it safe and also prudent to assert three things as applicable generally and to all the cases alike. First, this court has never decided, either by a direct determination or by necessary implication, that the law of 1857 authorizes the imposition of a tax upon anything else than the actual capital of the corporations, together with their surplus; second, that the precise question whether the capital of the companies or the share stock of the shareholders forms the basis of valuation and the thing to be assessed, has not been heretofore formally and distinctly presented; and third, that all seemingly erroneous expressions of opinion are corrected at once when they are referred to the permissible conditions under which the value of the share stock in the market may be referred to, not as the thing to be valued and assessed, but as an aid or help in discovering the value of the other and different thing which is to be valued and assessed. Keeping these general propositions in mind we now recur to the cases.

[After commenting upon various New York cases, the opinion connues.]

And so I think the authorities either fairly permit or fully justify the conclusions which I have reached and which may be stated with reasonable accuracy thus: First, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus. Second, such capital and surplus must be assessed at its own value, and when that is correctly known and ascertained, no other value can be substituted for it. Third, where its amount and value are undisclosed and unknown the assessors may consider the market value of the share stock and the general condition of the company as indicative of surplus or deficiency and of the probable amount of either. Fourth, they may further resort to such means of information when the amount of capital and surplus is disclosed, but the assessors have sufficient reason to disbelieve the statement, and such reason is founded upon facts established by competent proof.

If these conclusions are correct it will follow that the assessment complained of should be cancelled. The corporation presented to the

assessors a sworn statement of its assets and liabilities. If it be true, there was nothing subject to assessment. But its truth is not questioned, and there is not the least reason to doubt it. The assessors did not doubt it: they merely deemed it immaterial, and so testified when examined. In other words, knowing with certainty the value of one thing, they claimed the right to affix to it the larger value of a different thing. Authorized only to tax against the company its capital and surplus, they assumed the right practically to tax it for the share stock held by individuals. They have not in terms claimed that the share stock is the subject of taxation, nor has the counsel who represented them on the argument, but both have maintained and defended what is the exact and complete equivalent. The right asserted is a discretion in the assessors at their free will to assess corporations upon and at the value of their capital and surplus, or upon and at the value of the share stock independently of established facts and whenever they please. The law gives them no such discretion. How it has been exercised and how destructively to the rights of taxpayers may be seen by comparing the action in this case with that in one of the cases which we have reviewed. Where the share stock was selling at ninety, and so below par, the assessors refused to take that value and went to the company's books in search of a larger one, which they found and adopted. Here, where the actual value of capital and surplus is established so that they frankly admit the fact, they calmly disregard it and fly to the larger value of the share stock. The statute has given them no such right. They are not lawless rovers, wandering among corporations at will, but regular officers bound by discipline and controlled by the law, and whose discretion exists within fixed and definite limits.

It is said, and it is true, that large masses of personal property escape taxation, and the owners are persistent and artful and not over nice in their efforts to avoid a just share of the public burdens, and so we should uphold faithful assessors in every attempt to do their full duty. I think this court will not be unmindful of the situation, but before all we must first ascertain and then obey the law. If in that process evils result or are disclosed, the remedy must be sought elsewhere.

It follows that the judgment and order of the General and of the Special Term should be reversed and the assessment against the relator vacated and cancelled, without costs.

All concur, except Peckham, J., not voting.

Judgment reversed.

COOK v. CITY OF BURLINGTON.

1882. 59 Iowa, 251.

THE plaintiffs are the executors of the estate of James W. Grimes, deceased. They are residents of the city of Burlington, where the estate is situated. Part of the estate consists of shares of stock in the Dunleith and Dubuque Bridge Co., which is a corporation of that name, incorporated under the general incorporation laws of the State of Iowa, and having its principal place of business in Dubuque county. The corporation owns a bridge across the Mississippi River, from the city of Dubuque, Iowa, to the eastern shore of the river in the State of Illinois, and said bridge is all the tangible property owned by the corporation. The bridge was assessed for taxation at Dubuque, and the taxes were paid. The shares of stock in the bridge company held and owned by the estate of Grimes were also assessed for taxation for the same year at the city of Burlington. The plaintiffs claimed that the stock was not liable to taxation, and appealed from the board of equalization of the city of Burlington to the Circuit Court. Upon a trial in the Circuit Court it was held that the assessment of the stock was authorized by law, and plaintiffs appeal.

Hedge and Blythe, Shiras, Van Duzee and Henderson, for appellants. C. L. Poor, for appellee.

Rothrock, J.—The assessment of the bridge as the property of the corporation was authorized by law. Appeal of The Des Moines Water Company, 48 Iowa, 324. Whether the shares of stock can be legally assessed and taxed as the property of the stockholders for the same year for which the property of the corporation is assessed and taxed was not determined in that case. It was said, however, that "the statute provides that the stock of such corporations shall be assessed at its cash value. When assessed and taxed under the statute, stock must be taxed as the property of the respective owners, and there is no provision making the corporation liable therefor."

We have then the question in this case whether the shares of stock may be taxed in addition to the taxation of the property of the corporation.

And we may say, once for all, at the outset, that our views, as expressed in the case just cited, that the statute provides that the stock shall be assessed and taxed, remains unchanged. This conclusion is not founded upon any doubtful construction of the statute, but upon its plain, certain and unequivocal language and meaning. The statute imposing this burden upon the stock is found in section 813 of the Code, and is as follows: "Depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value,* * * *."

It is idle to contend in the face of this plain and explicit language that the legislature has not required that stock in corporations shall be assessed, and the only question now for determination is, does the legislature have the power to determine that the property of a corporation and the stock shall both be taxed.

Counsel for appellants contend that no such power exists, because it is duplicate or double taxation of the same property, and it is insisted that "this court has over and over again declared that double taxation is forbidden by our Constitution." If this statement were correct, and we should concede that the question here presented were one of duplicate taxation, the case could easily and speedily be disposed of by a prompt reversal. But, while it is true that this court in Tallman v. Butler County, 12 Iowa, 534, said that it "is neither the policy nor the justice of the law to tolerate double taxation," and in U. S. Express Co. v. Ellyson, 28 Id., 378, that "double taxation would be so unjust as to excite disfavor of both courts and legislature," and in McGregor's Executors v. Vanpel, 24 Id., 436, that mortgages upon real estate should be held to be taxable "unless this will lead to double taxation," yet it never has been held in this State, that what is denominated duplicate taxation is in excess of the legislative power. The most that can be said of these utterances of this court is, that it should be held in disfavor by courts and legislatures.

In Cooley on Taxation, 165, it is said: "It has properly and justly been held that a construction of the laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute or by necessary implication."

Upon the question as to whether the imposition of taxes upon the property of a corporation and upon the shares of stock in the hands of stockholders, the general observations upon the subject of duplicate taxation found in Cooley on Taxation, page 159, seem to us to be appropriate to be here quoted. It is there said: "A system of indirect taxes, combined with a system of general taxation by value, must often have the effect to duplicate the burden upon some species of property or upon some persons, and the taxation of stockholders of a corporation and also of the corporation itself, must sometimes produce a like result. There is also, sometimes, what seems to be double taxation of the same property to two individuals, as where the purchaser of property on credit is taxed on its full value while the seller is taxed to the same amount on the debt * * * *. Now, whether there is injustice in the taxation, in every instance in which it can be shown that one individual, who has been directly taxed his due proportion, is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results."

It must be conceded that the taxation of the property of the cor-

poration and also of the stock bears no resemblance to taxing the same tract of land twice to the same person, nor once to A, and again to B. That would be a double taxation, which we suppose would not be allowable in any State in the Union. It would be a direct discrimination and inequality in the exercise of the taxing power, which would impose a greater burden upon one citizen than upon another upon the same kind of property. But the case at bar is quite different. The corporation is a person distinct from the stockholder. It is true, it is what is denominated an artificial person, and may be said to be ideal and intangible. But that it is a person in law is the first principle learned by the student in opening any book on corporations. Its stockholders are distinct and different persons. They are usually not liable for its debts, and have no right to the enjoyment or possession of its property during the period of its duration or until it be dissolved by some procedure known to the law. The stockholder is entitled to dividends upon his stock, if there be any dividends, and the value of his stock depends upon prospective dividends, and the dividends depend upon the net earnings of the corporation. If the bridge in this case be taxed, the tax must be paid from the income, and this reduces the value of the stock, so that there is no duplicate taxation, so far at least as the tax upon the bridge reduces the value of the stock.

In McGregor's Exec'rs v. Vanpel, supra, this court held that a mortgage given to secure the payment of the purchase-money of the premises mortgaged is not exempt from taxation. In that case it is said that "a system of assessments operating with entire equality and with absolute justice is a desideratum in government yet unattained, and perhaps unattainable." And in Finley v. Philadelphia, 32 Pa. St., 381, it is said: "There is nothing poetical about tax laws, whenever they find property they claim contribution for its protection without any special respect to the owner or his occupation."

The best devised system of taxation based upon the values of property must, of necessity, produce unequal results, so long as the attempt is made to tax all property including real estate, personal chattels, and moneys and credits. One person will be taxed upon the real estate bought upon credit, and another upon the obligation which he holds for the purchase-money. And this must necessarily be so or there would be but little taxation upon credits, because, for the most part, they are either the representative of money or property of some kind held by another. If as is said in Cooley on Taxation, p. 100. "all the property in a town is sold on credit and the property is taxed to the purchasers, and the debts to sellers, it is manifest that the town taxes twice as much wealth as lies within its borders." And yet under the system of taxation adopted by the State of Iowa, it cannot be claimed that the assessor must inquire of the owner of promissory notes, or mortgages, whether they are credits for taxable property which has been sold by the holder of these credits.

In the case at bar the stockholders path to the corporation a certain

sum of money. The corporation used this money in the construction of a toll-bridge from which the corporation derived an income. The agreement between the contracting parties is that the corporation is to manage and control the bridge, make the necessary repairs, and pay the taxes assessed against the bridge, and after deducting these legitimate and necessary expenses pay to the stockholder his proportionate share of the net earnings, and upon the dissolution of the corporation the stockholder is to be repaid his money advanced from the property belonging to the dead corporation. Now, suppose this very contract were made with a natural person instead of a corporation, and the stockholder or creditor should make a claim that the obligation held by him was not taxable. There would be no more grounds for such claim under our system of taxation than there would be for the claim that if A loans B \$100, which is invested in merchandise, the debt is not taxable because the merchandise is taxable.

These illustrations, it appears to us, demonstrate that if we were to determine that the legislature has no constitutional power to impose this tax upon the stockholder, it would open a door into a sea of trouble in the administration of the revenue laws of the State.

In disposing of this important question we have not reviewed the authorities cited by the respective counsel of the parties. It is sufficient to say that these views are supported by the very great majority of adjudged cases upon this subject. We think the Circuit Court correctly determined that the shares of stock are taxable. And if the public interests of this State require that either the property of a corporation of this character, or the stock therein be exempt from taxation, that relief must come from the law-making power. It will be understood that the decision in this case will have no application to capital stock in manufacturing companies. By chapter 57 of the laws of 1880 such stock is exempt from assessment and taxation.

Affirmed.

[Adams, J., delivered an opinion, concurring in the result but not upon the foregoing grounds.]

VAN ALLEN v. THE ASSESSORS.

1865. 3 Wallace U. S. 573.1

Error to the New York Court of Appeals.

This was a suit involving the question of right, on the part of States, to tax shares in the national banking associations created under the act of Congress of June 3, 1864 (amending the act of Feb. 25, 1863). By the U. S. Laws, at least one third of the capital is required to be invested in interest-bearing bonds of the United States. The capital

¹ Statement abridged. Only portions of the opinions are given. - ED.

stock is to be divided into shares of \$100 each, and is to be deemed personal property.

By the 40th section of the act of 1864 it is enacted — the act of 1863 containing no such provision —

"That the president and cashier of every such association shall cause to be kept, at all times, a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted, and such list shall be subject to the inspection of all shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day," &c.

The 41st section, of the same act of 1864, provides by one part of it for taxation by the United States. It imposes a tax of one per cent. annually on circulation; one half of one per cent. on deposits, and then one half of one per cent. on the capital beyond the amount invested in United States bonds; and after prescribing how the duty is to be collected, and the penalty for default, &c., the section proceeds:

(1.) "Provided, that nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. (2.) Provided further, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located. (3.) Provided, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

With this statute of the Federal Government, authorizing banking associations, in force, the legislature of New York, on the 9th March, 1865, passed "an act, enabling the banks of this State to become associations for the purposes of banking, under the laws of the United States." The act, frequently called "The Enabling Act," imposed a tax upon all shares in national banks, in the hands of their holders.

The Assessors of Albany assessed Van Allen for shares, owned by him, of a National Bank in that city. At the time of assessment the whole capital of the bank was invested in various obligations of the Federal Government; in regard to all of which Congress had enacted that, "whether held by individuals, corporations, or associations," they should be "exempt from taxation by or under State authority."

A previous N. Y. statute, of 1857, enacted that the capital stock of the banks of the State should be assessed at its actual value. The U. S. Supreme Court held that a tax under this statute could not legally

¹ Session Acts of 1865; chap. 97.

be imposed on such part of the capital stock as was invested in U. S. securities. (Bank of Commerce v. New York City, 2 Black, 620, decided in March, 1863.) In April, 1863, the N. Y. legislature passed another statute, enacting that all banks shall be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings, &c. The U. S. Supreme Court held that the tax thus provided for could not legally be imposed upon such property of the banks as was invested in U. S. securities. (The Bank Tax Case, 2 Wallace, U. S. 200, decided in 1865.) It was within a few days after that decision that the statute under which the present case arose was enacted.

The New York Court of Appeals held that the tax was legal. The case having been carried, on error, to the U.S. Supreme Court, the Judges of that Court were unanimously of opinion that the enabling act of New York did not conform to the second proviso in the 41st section of the act of Congress; and that hence, even if the State had power, by a properly framed statute, to tax the shares, yet the State had not legally exercised that power. Consequently the decree of the Court of Appeals, affirming the legality of the tax in question, was reversed. But, as the defect in the N.Y. statute was one which might be easily remedied by the State legislature, the Court expressed its opinion on the main question which had been fully argued.

Nelson, J. . . . The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States?

The court are of opinion that this power is possessed by the State, and that it is due to the several cases which have been so fully and satisfactorily argued before us at this term, as well as to the public interest involved, that the question should be finally disposed of.

But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of The Queen v. Arnoud. The question related to the registry of a ship owned by a corporation. Lord Denman observed: "It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation, as they may derive indi-

1 9 Adolphus & Ellis, New Series, 806.

vidual benefits from its increase, or loss from its decrease; but in no

legal sense are the individual members the owners."

The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it.

[After commenting on various provisions in the National Banking Act, in which the terms "shares" and "shareholders" occur.]

In all these instances, it is manifest that the term as used means the entire interest of the shareholder; and it would be singular, if in the use of the term in the connection of State taxation, Congress intended a totally different meaning, without any indication of such intent.

This is an answer to the argument that the *term*, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the State assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction.

Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization. But, for the reasons stated in the fore part of the opinion, the judgment must be reversed and the case remitted to the Court of Appeals of the State of New York, with directions to enter judgment for the plaintiffs in error, with costs.

Chase, C. J., dissenting. [Wayne, J., and Swayne, J., concurring in the dissent.]

But, it is insisted that the shares of capital may be taxed by another rule than that which governs the taxation of other moneyed capital, because of something peculiar in the nature of shares. It is said, that the association owns the capital, and that the shareholders have no control over this property except through the choice of officers, directors, or agents, and no right to the property except the right to receive

a due proportion of the earnings of the association while it exists, and a similar proportion of the property after its dissolution.

It is true that the shareholder has no right to the possession of any part of the corporate property while the corporation exists and its affairs are honestly managed. He has committed his interest, for a time, to the possession and control of the corporation of which he is a member, and he has only a member's voice in the management of it.

So a man who has leased a farm has no right to possession or control during the lease; but who denies his property in the farm? And if a dozen owners join in the lease, has not each one an interest in the property to the extent of one-twelfth?

So, if for the time the property of the shareholder is placed beyond his direct control, and converted into property of the association, how can that circumstance affect the intrinsic character of his shares as shares of the whole corporate property? How can a man's shares of any property be the subject of valuation at all if not with reference to the amount and productiveness of the property of which they are a part? What value can they have except that given them by that amount and that productiveness? A certificate of title to a share is not a share. It is evidence of the shareholder's interest. His interest may be transferred by the transfer of the certificate; but it is not the. certificate that is valued when the worth of the share is estimated either by the speculator in the market, or by the tax assessor. It is the property which it represents that is valued, by the speculator often with reference to speculation only, but by the public officer, always, if he does his duty, by the real worth of the property, all things considered.

MONROE SAVINGS BANK v. CITY OF ROCHESTER.

1867. 37 New York, 365.1

Case submitted on a written statement of facts; to test the validity of a tax assessed against the Savings Bank for a "valuation of personal property" \$83,000. At the time of assessment the Savings Bank was indebted to depositors in the sum of \$1,611,000, and held and owned money and securities to the nominal amount of \$1,694,000. \$425,000 of its bonds and securities were in bonds and securities issued by the United States. The statute under which the tax was assessed is quoted in the opinion.

The General Term of the Supreme Court gave judgment for defendant. The Savings Bank appealed.

James L. Angle and Isaac Hills, for appellants.

¹ Statement abridged. - ED.

E. A. Raymon, for respondents.

Fullerton, J. It is settled by the decisions of the Supreme Court of the United States, that the State legislature has no power to impose a tax upon the bonds or securities mentioned in the foregoing statement, issued as a means of borrowing money upon the credit of the United States, whether such bonds and securities are held by individuals or corporations; and it is agreed in such statement that they are "exempt from assessment by the laws of congress."

It is a necessary result that such exemption cannot be evaded by any mere change of form or name in the law by which the tax is imposed. If, in fact, the tax is laid upon such bonds or securities, then, by whatever form of words the imposition is laid, it is illegal.

Hence, it is not lawful, for the purpose of state legislation, to assess the whole capital of a bank, at its value, or at its nominal amount, when such capital is invested, in whole or in part, in such securities. (2 Black, U. S. 620.)

And a tax imposed by a State upon a bank, at a valuation equal to the amount of its capital stock paid in, is a tax upon the property of the stock constituting its capital; and if such capital is invested in such securities, the tax is illegal, and the law imposing it is void. (2 Wallace's U. S. 200.)

The principle decided in these and other cases decided in the same court, is that whenever by State law a tax is laid upon property which consists of United States bonds exempt from taxation, then, in whatever form, or in whatever terms the law is expressed, it is void, and cannot be enforced.

I proceed to apply the rule thus stated to the case under consideration. The act in question provides as follows:

"The privileges and franchises granted by the legislature of this State to savings banks or institutions for savings, are hereby declared to be personal property, and liable to taxation as such, in the town or ward where they are located, to an amount not exceeding the gross sum of their surplus earned, and in the possession of said banks or institutions, and the officers of such institutions or banks may be examined on oath by assessors as to the amount of such surplus; and the property of such banks and institutions shall be liable to seizure and sale for the payment of all taxes assessed upon them for said privileges and franchises." (Laws of 1866, vol. 2, p. 1674.)

In declaring the privileges and franchises of a bank to be personal property, the legislature has adopted no novel principle of taxation. The powers and privileges which constitute the franchises of a corporation are in a just sense property, and quite distinct and separate from the property which by the use of such franchises the corporation may acquire. They are so regarded by the law and so regarded by common acceptation. And, although it has not heretofore been customary, in this State at least, to subject them to taxation, yet it must be conceded that it may be done if the legislature see fit so to enact.

It follows, that, if such taxation falls within the scope of legislative power, that power may also prescribe a rule, or test, of value. In the case stated, the legislature, leaving the estimate to the assessors, would make the valuation depend upon all the circumstances which, irrespective of the amount of property which the corporation actually holds, give value to the privileges enjoyed. All franchises are not of equal value. One corporation may enjoy a monopoly, and another be subject to competition with rivals, thus being less valuable. In some instances, the value of the franchise would depend upon the nature of the business authorized, and the extent to which permission was given to multiply capital for its prosecution. Under such circumstances, it would be expected that the legislature would prescribe some equitable test or rule of valuation which should guide or control the estimate of the assessors in fixing the amount of the tax. It can hardly be denied that a fair measure of the value of the franchises of corporations would be the profits resulting from their use; and in adopting such a rule of estimate, no one could justly complain of its being unequal in its effects upon different corporations, or unjust in its general operation.

In the case before us, the test of value of the franchises is, not the amount of annual profits, but the rule is, the judgment of the assessors, limited to the amount of profits over and above the dividends of profits which the corporation has seen fit to declare and pay to its depositors.

These observations are made, not because the question, whether the operation of this statute is just and right, is open to judicial examination, but because they tend to prove that the act in question is, what it professes to be, a tax laid upon the franchises named in it, and not an indirect tax upon the securities held by the bank, and in that way attempting to avoid the principle of the decisions already quoted. Bad faith, or a design to evade the inhibitions implied in the Constitution of the United States or expressed in the acts of congress, are not to be presumed or to be imputed to the legislature, unless necessary construction compels it.

In this case the tax is declared in terms to be upon the franchises and privileges granted. (If there are no surplus earnings, then there can be no tax. If there are such earnings, then it is reasonable to say that the privilege which produced them is valuable, and may justly be regarded as property subject to the taxing power.) This mode of limiting the taxing power, indicates strongly that the intention of the legislature was that it should not exceed a just and equitable assessment of the franchises and privileges granted, considered in reference to the pecuniary benefits and advantages resulting from their use.

It now becomes important to inquire, whether the assessment in the case now before us is affected by the fact that the banks have invested a portion of their moneys received from depositors, or the profits arising on such moneys, in bonds or securities of the United States which are exempt from taxation.

In my opinion, if the whole of the plaintiff's funds were so invested, it would not affect the validity of the act. The tax being levied upon the franchises and privileges of the corporation, the special use which it makes of its lawful powers is quite unimportant. Because, I repeat, that neither the aggregate property employed, nor the accumulated profits, are taxed. They are regarded as important only as they may furnish a just and fair measure of estimating the value of the property which produced them, in order that such value may form the basis of taxation.

I find no warrant for the assumption, that, in the cases now before us, the surplus earned and in the possession of the plaintiffs is invested in bonds or securities of the United States. The classification of their assets, which lays the foundation for it, does not result from the application of any rule of law, and we cannot judicially declare that the funds so invested are not the identical funds received from depositors. If it would affect the legal question, it should be shown, as matter of fact, that the surplus is specifically so invested.

It is true, that where a State tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed.

It is, however, argued with great ingenuity and skill, that, inasmuch as the plaintiffs, among other powers given them, have the right to invest their money in United States bonds, their franchises and privileges cannot be taxed by the State. The power thus to invest their moneys, it is contended, is a franchise for lending to the United States, and therefore cannot be taxed, because such taxation would trench on the power of the United States to borrow. This is stretching the argument too far. It cannot be pretended that the State would violate any obligation resulting from the power of the United States to borrow money, if the law conferring the power upon the plaintiffs to invest their moneys in United States stocks and bonds were repealed. The State is under no obligation, express or implied, to legislate to enhance the credit of the general government. and should it adopt a system of legislation which indirectly produces such a result, its power of repeal cannot be doubted. The position, that a franchise granted by the bounty of the State is not taxable. because coupled with that franchise is the privilege of loaning money to the general government, is not more untenable than to argue, that, because such a franchise enhances the credit of the United States, therefore the legislature could not repeal the law granting the franchise without violating its constitutional obligations. Suppose the legislature had limited the amount in which the plaintiffs could invest its moneys in the securities of the United States, it will not be contended that such limitation would be void because it impaired the power of the United States to borrow money.

It must, therefore, be regarded as sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it, and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden.

In my opinion, the statute in question here is not obnoxious to the objection that it is in conflict with the power of the United States, nor is it to be regarded in any sense as indicating an unfriendly or hostile spirit.

Judgment affirmed.

Dorsey, J., in MAYOR, &c. OF BALTIMORE v. BALTIMORE & OHIO R. R. CO.

1848. 6 Gill (Maryland), 288, pp. 295-296.

[Charter provides that "the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen."]

Dorsey, J.

But it is said, that although by the charter of the Baltimore and Ohio Rail-road Company, its shares of stock may be exempt from all taxation, yet that such exemption in no wise protects from taxation the specific articles of property of the Company. If such a specific property be deemed liable to the imposition of taxes, no sufficient reason can be assigned why the franchise should not be subject to the like imposition. It is as much an ingredient in the shares of stock, and component part of their value, as is any portion of the corporate property of the Company; and if under such an express legislative exemption as that now before us, the one be exempt from taxation, so also is the other.

The design contemplated by the legislature in the insertion of this clause of exemption in the act of Assembly, was to confer a certain substantial, not a nominal benefit, on the stockholders, and to induce capitalists to risk their money in a novel and hazardous enterprise. To impute to the legislature, in the case before us, an intention to exempt the shares of the stock from taxation, and at the same time to reserve the right to tax every thing which constituted it a stock, and gave to it its value, would be gratuitously to cast an imputation upon the legislature, inconsistent with every principle of judicial courtesy. If, as has been contended, the legislature designed to retain the right

of taxation upon the property of the Company, other than its franchise, it would have expressed its intention in terms about which there would have been no controversy; it would have limited its immunity to the franchise only, not to the shares of stock, which embraces every species of property owned by the Company.

VAN SYCKEL, J., IN SINGER MFG. CO. v. HEPPENHEIMER.

1896. 58 New Jersey Law, 633, pp. 637-638.

VAN SYCKEL, J.

It has long been the accepted law of this state that an enactment which exempts a corporation or its property from taxation, exempts also the shares of its stock held by individuals.

The reasoning of the court upon which that conclusion was rested was that, as the entire burden of taxes levied upon a corporation ultimately fell upon the shares of stock, it must have been the intention of the legislature in exempting the former to relieve the latter. State v. Branin, 3 Zabriskie, 484; State v. Bentley, Id. 532; State v. Powers, 4 Id. 400.

The converse of this it seems must be conceded, so that an express exemption of the shares from taxation will also exempt the company. Otherwise, the exemption is, in fact, not an exemption, for every burden cast upon the property of the company is a burden upon the shares which represent that property.

SHELBY COUNTY v. UNION, &c. BANK.

1896. 161 U.S. 149.1

APPEAL from U. S. Circuit Court for Western District of Tennessee. S. P. Walker (C. W. Metcalf and F. T. Edmondson, with him), for Shelby County.

Wm. H. Carroll (Isham G. Harris with him), for Union and Planters' Bank.

Peckham, J. This is an appeal from the decree . . . granting an injunction at the suit of the Union and Planters' Bank to restrain the municipal authorities from collecting any tax laid upon the surplus of the bank, on the ground that such surplus is exempt under a clause

1 Citations of counsel omitted; also portions of opinion.—ED.

in the charter of the bank similar to the one discussed in the above cases of the Bank of Commerce, ante, 134.1

There are two grounds, either of which, if decided in favor of appellants in this case, would result in upholding the validity of the tax upon the surplus: First, if it should be held that by the true interpretation of the charter the exemption, while applying to the shares of stock in the hands of the shareholders, does not extend to the corporation itself, the tax would be valid; second, even if the tax on the capital stock were void, that upon the surplus might still be upheld on the authority of the case of the Bank of Commerce, ante, 134. We have already held in that case that a tax on the surplus was valid, but the question whether a tax on the capital stock of the bank was valid could not be raised there, because the case was before us on a writ of error taken to a state court, and the question in the state court was decided in favor of the exemption claimed by the bank. This being an appeal from a judgment of the United States Circuit Court, both questions are open for our decision. We think it, therefore, proper to here decide the question first above stated.

We stated in the Bank of Commerce case, ante, 134, that the tax provided in this charter is laid upon the shares of stock in the hands of the shareholders, and they are exempt from any further taxation on account of their ownership of such shares. In that respect we followed the case of Farrington v. Tennessee, 95 U. S. 679, and we refused in the Bank of Commerce case to overrule or distinguish it; but it is claimed on the part of the appellee herein that the Farrington case also decided that the charter tax is in lieu of all other taxes, not only upon the shares in the hands of the shareholders, but that it exempts the corporation and all its property from any further taxation. We cannot give so broad an effect to the decision in the Farrington case. The question of the exemption of the corporation and its property from taxation did not arise in that case, and there was no adjudication of that question by its decision.

There are undoubtedly some expressions in the opinion of Mr. Justice Swayne which lend color to the idea that, in his belief, not only were the shares in the hands of the shareholders exempt from any further taxation than that imposed by the charter, but that the property of the corporation was itself exempt from any taxation other than that provided for in that section; the latter question, however, was not before the court and was not decided by it, and we are of opinion that, assuming that the charter tax was laid upon the shares of

^{1 &}quot;Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes; and shall pay to the State an annual tax of one half of one per cent on each share of eapital stock, which shall be in lien of all other taxes."—ED.

stock in the hands of the shareholders, the exemption from further taxation applies to the subject which was taxed under the charter, and is not of any greater scope, and that it would not, therefore, include the exemption from taxation of either the capital stock or the surplus, which is the property of the corporation itself. We come to this conclusion because of the fact, well established by the decisions of this as well as many state courts, that there is a clear distinction between the capital stock of a corporation and the shares of stock of such corporation in the hands of its individual shareholders. separate are these properties, and so distinct in their nature, that the taxation of the one property is not the taxation of the other. This is no new doctrine, and the distinction between the two properties was recognized by the Supreme Court of Tennessee as long ago as in the case of the Union Bank v. State, 9 Yerger, 490, decided in 1836. was held that, under the clause of the charter there under consideration, any further tax on the capital stock than that which was provided for in the charter itself was void, but that the State might tax the shares of stock in the hands of individuals notwithstanding the exemption from further taxation on the capital stock.

[After commenting upon various cases, including Gordon v. Appeal Tax Court, 3 Howard, U. S. 133.] Long after that case was decided this court in many cases, notably that of Van Allen v. Assessors, 3 Wallace, 573, and People v. Commissioners, 4 Wallace, 244, recognized the separate and distinct character of the two properties, the capital stock and the shares thereof in the hands of individual shareholders, and such separate property in our opinion is strong proof of the limitation of the exemption to the property which is taxed.

We have found no case in this court which is authority for the proposition, that language, such as is under consideration in this case, exempts from further taxation both the capital stock of the corporation and the shares of stock in the hands of individual shareholders. As the Farrington case decides that this language does import that the charter tax is laid upon the shares in the hands of individual shareholders, and that those shares are exempt from further taxation, that question is set at rest, and there being nothing in any case which extends that language to both properties, we hold that when it is made applicable to the separate shares in the hands of individual shareholders, it does not apply to or cover the case of the capital stock of the corporation, and that such stock is liable to be taxed, as the State may determine.

This determines the liability of the capital stock of the Union and Planters' Bank to taxation, and of course it overrules any claim on the part of that bank for exemption from taxation of its surplus or accumulated profits. The question whether such surplus could be taxed if the capital stock itself were to be regarded as exempt has

also been decided in the preceding case of the Bank of Commerce. The decree of the Circuit Court must, therefore, be

Reversed, and the cause remanded to that court with directions to dismiss the bill with costs.

Mr. Justice White dissented.

The question whether the surplus could be taxed if the capital stock itself were to be regarded as exempt was answered affirmatively in the preceding case, Bank of Commerce v. Tennessee, 161 U.S. 134. While a similar exemption clause was in force, the legislature enacted, "that the surplus and undivided profits in such bank . . . shall be assessable to said bank . . . and the same shall not be considered in the assessment of the stock therein."

The case came up on error to the Supreme Court of Tennessee. That court had held that the capital stock was exempt from taxation; and the U. S. Supreme Court held that it had not power to review the decision of the State court on this point. (See, however, a decision on rehearing, 163 U. S. 416.) The Tennessee Court had also held, that the surplus was taxable; and the correctness of that decision was open to review in the U. S. Supreme Court.

The opinion of the Court upon this branch of the case was as follows: Peckham, J. The corporation, plaintiff in error, demands the same exemption from taxation on its surplus that has been accorded it for its capital stock, and it bases its contention upon the same clause of exemption in its charter. We think it cannot be sustained as to the surplus, which we believe is taxable under the law above quoted. This whole demand of exemption from taxation made by the bank and its shareholders must be considered with reference to the general rule governing claims of that nature. It is well known, has long existed, and is undoubted. New Orleans City & Lake Railroad v. New Orleans, 143 U. S. 192, 195; Vicksburg & Pacific Railroad v. Dennis, 116 U. S. 665, and many cases there cited; Farrington v. Tennessee, 95 U. S. 679, 686; West Wisconsin Railway v. Supervisors, 93 U. S. 595; Tucker v. Ferguson, 22 Wall. 527.

These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. Van Allen v. Assessors, 3 Wall. 573; People v. Commissioners, 4 Wall. 244, cited in Farrington v. Tennessee, 95 U.S. 687.

This statement has been reiterated many times in various decisions by this court, and is not now disputed by any one. In the case last cited, Mr. Justice Swayne, in delivering the opinion of the court, enumerated many objects liable to be taxed other than the capital stock of a corporation, and among them he instanced, (1.) the franchise to be a corporation; (2.) the accumulated earnings; (3.) profits and dividends; (4.) real estate belonging to the corporation and necessary for its business; and he adds that "this enumeration shows the searching and comprehensive taxation to which such institutions are subjected where there is no protection by previous compact." And in Tennessee v. Whitworth, 117 U.S. 129, at page 136, Mr. Chief Justice Waite, in delivering the opinion of the court, says: "That in corporations four elements of taxable value are sometimes found. First, the franchise; second, the capital stock in the hands of the corporation; third, the corporate property; and, fourth, the shares of capital stock in the hands of the individual stockholders."

The surplus belonging to this bank is "corporate property," and is distinct from the capital stock in the hands of the corporation. The exemption, in terms, is upon the payment of an annual tax of one half of one per cent upon each share of the capital stock, which shall be in lieu of all other taxes. The exemption is not, in our judgment, greater in its scope than the subject of the tax. Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. very name of surplus implies a difference. There is capital stock and there is a surplus over, above and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders.

The case of Bank v. Tennessee, 104 U.S. 493, does not hold to the contrary of this doctrine. This question was not therein discussed or decided. The question which was decided related only to the taxation of real property not used by the bank in its business, and it was held liable to taxation.

The case is no authority for the proposition contended for here, namely, that the whole surplus of this bank is exempt from taxation. No individual shareholder has any legal right to claim any portion of this surplus; until divided by the board of directors it remains the

property of the corporation itself, and in the sense in which the words "capital stock" are used in the exemption clause the surplus does not form any part thereof. It is said that the purpose of incorporating a bank is to enable the institution to accumulate profits and to make dividends out of them, and that the dividends cannot be made until the profits have been accumulated, and that under this ruling profits would come under the description of surplus to be taxed before distribution in a dividend. It is true that dividends cannot rightfully be made until profits have accumulated; but it is one thing to accumulate profits each six months or annually and then divide them among the stockholders by way of dividends, and quite another thing to accumulate profits year after year, and, while still declaring dividends, accumulate a surplus which is not so divided. The sums accumulated by way of profit between the regularly recurring dividend days might not be regarded as surplus, provided those profits were regularly distributed in dividends. The surplus in this case is clearly not of that kind which has been saved for the purpose of being distributed by dividends. It may be true that the general effect of a tax on this surplus might indirectly operate upon the shareholder by possibly lessening the value of his shares to some extent, but that is not the same as if a tax had been laid upon those shares. In levying the charter tax it was conceded that the tax has always been measured by the par value of the shares of stock, while the actual value of such shares, because of the large surplus owned by the bank, may have been very much greater, and the statute under which the surplus is taxed provides that such surplus must not be considered in the assessment upon the stock; so that provision is made whereby a tax upon the surplus and the charter tax upon the shares of stock will neither be double nor unjust taxation. Although a surplus may be required by the national banking act, and also by the laws of good and safe banking, yet we do not perceive that this fact has any material effect upon the question.

We are, therefore, of opinion that the surplus was properly taxed, and that the bank's claim of exemption as to such surplus is without foundation in law.

UNITED STATES v. WOLTERS.

1891. 46 Federal Reporter, 509.

Ross, J. This is a suit to recover of the holders of the stock of a corporation organized under the laws of California to engage in, and which did engage in, the business of distilling, a tax amounting to \$20,124.40 on spirits distilled by it, and of which tax, it is alleged, the distiller defrauded the government. The action is based on that clause of section 3251 of the Revised Statutes which declares that

"every proprietor and possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom." Demurrers to the complaint have been filed by some of the defendants, and in their support it is urged that the language of the statute in question is not broad enough to include the stockholders of a corporation engaged in the business of distilling; that stockholders are neither proprietors nor possessors of the corporate property; and that the words "interested in the use of" were inserted "to designate a class who might be using, or interested in using," such distillery, although not interested in the pro-

perty itself.

The language of the act does not admit of such limitation. Revenue laws are not, like penal laws, to be strictly construed, nor are they, like remedial statutes, to be construed with extraordinary liberality; but they should be so construed "as most effectually to accomplish the intention of the legislature in passing them." Taylor v. U. S., 3 How, 197. The provisions of the law are rigid, and in some instances perhaps arbitrary, in their operation. But they were designed to prevent frauds upon the government, and whoever engages in business by virtue of their provisions must be governed by them. The holder of stock in a corporation organized for and engaged in the business of distilling spirits, if not the proprietor or possessor of the distillery within the meaning of the statute, is certainly "interested in the use of" the distillery operated by the corporation of which he is a stockholder. He has a direct, pecuniary interest in the business of distilling, — the purpose for which the distillery is used, — as well as in the property itself. The amount of such interest, whether large or small, is of no consequence. The statute declares that every person so interested shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom. It is obvious that the state statute regulating the liability of stockholders of corporations organized under its laws has no application here. The liability of the defendants is to be measured by the provisions of the statute under which, and by virtue of which only, the distilling was

Demurrers overruled, with leave to defendants to answer within the usual time.

A similar result was reached by the Supreme Court of California in *Richter* v. *Henningsan*, 110 California, 530, decided in 1895.

The Court said, in part:

A stockholder in a private corporation for profit is not in any proper sense the owner of the property of the corporation as such. He has, however, a direct interest in the corporation. In *Plimpton* v. *Bigelow*, 93 N. Y. 592, it was said: "The right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to partici-

pate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts." Gibbons v. Mahon, 136 U. S. 549, and Kohl v. Lilienthal, 81 Cal. 378, are to like effect.

A stockholder has an insurable interest in the property of the corporation. (Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7; 21 Am. St. Rep. 716; Warren v. Davenport etc. Ins. Co., 31 Iowa, 464; 7 Am. Rep. 160.)

At common law a stockholder in a corporation, on account of his interest, was not a competent witness for the corporation in an action against it, or to serve as a judge or juror where the corporation was a party.

We must not confound the liability of a stockholder in a corporation, under the law of its creation, with that imposed upon him by the act of Congress. His liability under the latter is quite independent of the former, and is just what the act of Congress has imposed upon him.

That liability under the law applies not only to every proprietor and possessor of a still, but also to "every person in any manner interested in the use of any still, distillery, etc.," and makes them all jointly and severally liable for the tax.

[The court refer to opinions of the Attorneys General; vol. 15, p. 559; vol. 16, p. 10.¹]

1 In Regina v. Arnaud, 9 Queen's Bench, 806, the Court decided that a British corporation, whose shareholders were in part foreigners, was entitled to have a vessel owned by it registered under a statute limiting the right of registry to such vessels as "shall wholly belong and continue wholly to belong to her Majesty's subjects;" and further providing that no foreigner should be "the owner, in whole or in part, directly or indirectly," of any vessel entitled to be registered. Lord Denman said: "It appears to us that the British corporation is, as such, the sole owner of the ship, and a British subject within the meaning of the fifth section, as far as such term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company; and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel."

[The above is quoted from 2 Morawetz on Corporations, s. 1091.]

SECTION III.

The Distinction as applied to Jurisdiction of U. S. Court on the Ground of Diversity of Citizenship.

BANK OF UNITED STATES v. DEVEAUX ET AL.

1809. 5 Cranch, U.S. 61.1

Error to the U.S. Circuit Court for the District of Georgia.

The declaration describes the plaintiffs as "The President, Directors and Company, of the Bank of the United States, . . . established under an act of congress. . . ." At the close of the declaration is the following allegation: "And your petitioners aver that they are citizens of the State of Pennsylvania, and the said Peter Deveaux and Thomas Robertson are citizens of the State of Georgia."

Plea in abatement, denying the jurisdiction of the U.S. Circuit Court. Demurrer. Judgment for defendants upon the demurrer.

Binney and Harper, for plaintiffs in error.

P. B. Key, and Jones, contra.

MARSHALL, C. J. Two points have been made in this cause.

- 1. That a corporation composed of citizens of one State may sue a citizen of another State in the federal courts.
- 2. That a right to sue in those courts is conferred on this bank by the law which incorporates it.

The last point will be first considered. . .

[The court holds, that no right is conferred on the bank, by the act of incorporation, to sue in the federal courts.]

2. The other point is one of much more difficulty.

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different States," both parties must be citizens to come within the description.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

¹ Statement abridged. Arguments and part of opinion omitted. - ED.

A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens, or citizens of different States, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different State from the defendant to sue in the national courts. It is by a course of acute metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken.

As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible, and incorporeal. Yet, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

There is a case, however, reported in 12 Mod. 669, which is thought precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the mayor's court. The suit was brought by the mayor and commonalty, and was tried before the

mayor and aldermen. The judgment rendered in this cause was brought before the court of king's bench and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation.

In that case the objection that a corporation was an invisible, intangible thing, a mere incorporeal legal entity, in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual. In the opinions, which were delivered *seriatim*, several cases are put which serve to illustrate the principle and fortify the decision.

The case of The Mayor and Commonalty v. Wood is the stronger because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other.

If, then, the congress of the United States had in terms enacted that incorporated aliens might sue a citizen, or that the incorporated citizens of one State might sue a citizen of another State, in the federal courts, by its corporate name, this court would not have felt itself justified in declaring that such a law transcended the constitution.

The controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one State, suing by a corporate name, and those of another State. When these are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the constitution would authorize congress to give the courts of the Union jurisdiction in this case, in consequence of the character of the members of the corporation, then the Judicial Act ought to be construed to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.

That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the Registering Act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

The court feels itself authorized by the case in 12 Mod. (on a question of jurisdiction), to look to the character of the individuals who compose the corporation, and they think that the precedents of this

court, though they were not decisions on argument, ought not to be absolutely disregarded.

If a corporation may sue in the courts of the Union, the court is of opinion that the averment in this case is sufficient.

Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

Judgment reversed; plea in abatement overruled, and cause remanded.

[In 1806, the Supreme Court, in Strawbridge v. Curtiss, 3 Cranch (U. S.), 267, decided that, where there are two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the U. S. courts, in order to support the jurisdiction. Strawbridge was a citizen of Massachusetts. One of the defendants was a citizen of Vermont; the other defendants were citizens of Massachusetts. Held, that the U. S. court had not jurisdiction.

A logical application of the combined principles of Strawbridge v. Curtiss and Bank v. Deveaux was made in Commercial, &c., Bank of Vicksburg v. Slocomb (A. D. 1840), 14 Peters, 60. The plaintiffs, citizens of Louisiana, brought an action in the U. S. Circuit Court for the Southern District of Mississippi against a Mississippi corporation. The defendant pleaded that two of the members of the corporation were citizens of Louisiana. It was held, that, upon the facts thus pleaded, the court had not jurisdiction; the court saying (in effect) that all the corporators must be citizens of a different State from the opposite party.]

LOUISVILLE, CINCINNATI AND CHARLESTON R. R. CO. (PLAINTIFFS IN ERROR) v. LETSON.

1844. 2 Howard (U.S.) 497.1

Action in the U.S. Circuit Court for the District of South Carolina, by Letson, a citizen of New York, against a railroad corporation chartered by South Carolina. A plea to the jurisdiction alleged (inter alia) that, although some of the members of the corporation were citizens of South Carolina, there were two members who were citizens of North Carolina. A demurrer to this plea was sustained. Defendant then pleaded the general issue. After trial and verdict for plaintiff, the defendant brought a writ of error.

 $^{^1}$ Statement abridged. Arguments omitted. Only a small part of the opinion is given—ED. $\ensuremath{\bullet}$

Mazyck, for plaintiffs in error.

Pettigru, Lesesne, and Legaré (Attorney General), for defendant in error.

WAYNE, J.

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The objection is equivalent to this proposition, that a corporation in a State cannot be sued in the circuit courts of the United States by a citizen of another State, unless all the members of the corporation are citizens of the State in which the suit is brought.

If it be right to look to the members to ascertain whether there be jurisdiction or not, the want of appropriate citizenship in some of them to sustain jurisdiction cannot take it away, when there are other members who are citizens, with the necessary residence to maintain it.

After mature deliberation, we feel free to say that the cases of Strawbridge and Curtis, and that of the Bank and Deveaux, were carried too far. . . . The case of *The Commercial Bank of Vicksburg* and *Slocomb*, 14 Peters, 60, was most reluctantly decided upon the mere authority of these cases.

A corporation, created by a State, to perform its functions under the authority of that State, and only suable there, though it may have members out of the State, seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that State.

[After asserting that the Act of Feb. 28, 1839, enlarged the jurisdiction of the courts.]

The case before us might be safely put upon the foregoing reasoning and upon the statute, but hitherto we have reasoned upon this case upon the supposition that, in order to found the jurisdiction in cases of corporations, it is necessary there should be an averment, which, if contested, was to be supported by proof, that some of the corporators are citizens of the State by which the corporation was created, where it does its business, or where it may be sued. But this has been done in deference to the doctrines of former cases in this court, upon which we have been commenting. But there is a broader ground, upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some

particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued.

Judgment affirmed.

GRIER, J., IN MARSHALL v. BALTIMORE & OHIO R. CO.

1853. 16 Howard, 314, pp. 328-329.

But it is contended that, notwithstanding the court, in deciding the question of jurisdiction, will look behind the corporate or collective name given to the party, to find the persons who act as the representatives, curators or trustees, of the association, stockholders, or cestui que trusts, and in such capacity are the real parties to the controversy; yet that the declaration contains no sufficient averment of their citizenship. Whether the averment of this fact be sufficient in law is merely a question of pleading. If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it, the allegation that the "defendants are a body corporate by the act of the general assembly of Maryland," is a sufficient averment that the real defendants are citizens of that State.

SHIRAS, J., IN ST. LOUIS, &c. R. CO. v. JAMES.

1896. 161 U.S. 545, pp. 562-565.

THERE is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in "controversies between citizens of different States."

We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a

sense as to confer jurisdiction on the Federal courts at the suit of a

citizen of the State of its original creation.

We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it.

It is true that by the subsequent act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other State, which had theretofore leased or purchased any railroad in Arkansas, should, within sixty days from the passage of the act, file a certified copy of its articles of incorporation or charter with the secretary of state, and shall thereupon become a corporation of Arkansas, anything in its articles of incorporation or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the secretary of the state. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution so as to subject it as such to a suit by a citizen of the State of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation.

HANCHETT v. BLAIR.

1900. 100 Federal Reporter, 817.1

Blair, alleging himself to be a citizen of New Jersey, brought suit in the U. S. Circuit Court for the District of Nevada, against the Silver Peak Mines, a New York corporation, to foreclose a mortgage on real estate in Nevada. L. J. Hanchett, a citizen of California, was made a co-defendant. The answer of Hanchett alleged, in effect, that Blair was the owner of all the capital stock of the corporation, save a nominal number of shares standing in the name of his agents for the purpose of permitting them to be officers thereof. Judgment was rendered for Blair in the U. S. Circuit Court, and Hanchett appealed to the Circuit Court of Appeals for the Ninth Circuit.

Morrow, Circuit Judge.

It would appear from the foregoing that the citizenship of the complainant, as alleged in the bill of complaint, was sufficiently established by the proofs. But the appellant further attacks the allegation of diverse citizenship upon the ground that the evidence disclosed the fact that the complainant is a stockholder of the defendant corporation, and must therefore be presumed to be a citizen of the same state as the corporation. It is claimed that authority for this doctrine is found in the case of Railroad Co. v. Letson, 2 How. 497, 11 L. Ed. 353; In Railroad Co. v. Wheeler, 1 Black, 286, 296, 17 L. Ed. 130; and in Shaw v. Mining Co., 145 U. S. 444, 451, 12 Sup. Ct. 935, 36 L. Ed. 768. The question under consideration in those cases was not the citizenship of individuals, but the status of a corporation under the constitution and laws of the United States relating to jurisdiction of circuit courts over controversies between citizens of different states. It was conceded that a corporation was not a citizen, but courts had in certain cases recognized the real persons who composed the corporation, and hence, for the purpose of jurisdiction, the supreme court would consider a corporation created by the laws of a state as an organization similar to a partnership composed of individuals having citizenship; and thus it followed that if all the members of a corporation were citizens of one state, and the party on the other side was a citizen of a different state, the court had jurisdiction. But another difficulty arose. There were many cases of large corporations, where the members or stockholders were citizens of different states, and sometimes of foreign countries; and in such cases, the legal entity of the corporation not being recognized, the suit was necessarily between the individual members of such corporation and the opposing party. With the rapidly growing number of corporations, however, and the increasing volume of business transacted by

¹ Only so much of the case is given as relates to a single point. - ED.

means of corporate association, with interests extending, not only through many states, but over the entire world, and the holdings of stock naturally scattered, it became apparent that the effort to bring individual members, either personally or by representation, into the courts, would result in the most cumbersome and tedious litigation with unnecessary annoyance to the stockholders, and in some in stances accomplish the final defeat of the jurisdiction of the court, when based upon the lack of diverse citizenship between some of the members of the corporation on one side and parties on the other side of the controversy. To meet this difficulty the supreme court determined that, "where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence." It was further determined "that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body, and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States." Railroad Co. v. Wheeler, supra. These presumptions preserved the jurisdiction of the United States courts over corporations in accordance with the evident spirit and purpose of the constitution, but such presumptions had no relation to the citizenship of individuals as parties to a controversy in their own right, and it would manifestly be an unauthorized extension of their scope and effect to so construe the decisions of the supreme court. It follows that there is no legal presumption that the individual complainant, who is also a stockholder of the defendant corporation, is a citizen of the same state as the corporation.1

¹ As to the "inhabitancy," or "residence," of a corporation, see Curtis on Jurisdiction of U. S. Courts, 2d edition, 152-154; Shaw v. Quincy Mining Co, 145 U. S. 444; Galveston, &c. R. Co. v. Gonzales, 151 U. S. 496; also criticisms in 6 Thompson on Corporations, ss. 7488, 7489.

A corporation is not a "citizen" within the clause in the U. S. Constitution which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Paul v. Virginia, 8 Wallace, 168.

A corporation is a "person" within the 14th Amendment to the U. S. Constitution. Santa Clara County v. Southern Pacific R. Co., 118 U. S. 394. — ED.

CHAPTER III.

CREATION OF CORPORATION.

SECTION I.

By what Authority, and in what Method.

FRANKLIN BRIDGE CO. v. WOOD.

1853. 14 Georgia, 80.

Assumpsit in Heard Superior Court. Tried before Judge Hill, Term, 1853.

The Franklin Bridge Company was incorporated under the Act of the Legislature of 1843, to prescribe the mode of incorporating companies for certain purposes, by an order of the Inferior Court of Heard County,

The company sued the defendant, Wood, for his subscription to their stock.

The defendant pleaded that the company was not legally incorporated; contending that the act of the Legislature, referred to, was unconstitutional and void.

Upon argument, the court held that the act aforesaid was unconstitutional, and nonsuited the plaintiffs.

To this decision plaintiff excepted.

Mabry, for plaintiff in error.

Featherston, for defendant.

By the Court, Lumpkin, J., delivering the opinion: -

Is the Act of 1843 and that of 1845, amendatory thereof, pointing out the manner of creating certain corporations and defining their rights, privileges, and liabilities, unconstitutional?

By the first section of the Act of 1843, it is provided "That when the persons interested shall desire to have any church, camp-ground, manufacturing company, trading company, ice company, fire company, theatre company, or hotel company, bridge company, and ferry company, incorporated, they shall petition in writing the Superior or Inferior Court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the

object of their association, and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated; and said court shall pass a rule or order, directing said petition to be entered of record on the minutes of said court."

Section 2 enacts "That when such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal; to contract and be contracted with; to sue and be sued; to answer and be answered unto in any court of law or equity; to appoint such officers as they may deem necessary; and to make such rules and regulations as they may think proper for their own government; not contrary to the laws of this State; but shall make no contracts or purchase or hold any property of any kind, except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual members of such manufacturing, trading, theatre, ice, and hotel companies, shall be bound for the punctual payment of all the contracts of said companies, as in case of partnership."

The third section declares that "No company or association shall be incorporated under this act, for a longer period than fourteen years; but the same may be renewed whenever necessary, according to the provisions of the first section of this act."

The fourth section confers upon the Superior and Inferior Courts respectively, the power to change the names of individuals.

Section fifth. "For entering any of said petitions and orders, and furnishing a certified copy thereof, the clerk shall be entitled to a fee of five dollars; except in cases of applications by individuals for the change of names,—in which case, the clerk of said court shall be entitled to the fee of one dollar. And that such certified copy shall be evidence of the matters therein stated in any court of law and equity in this State." Cobb's Digest, 542, 543.

By the Act of 1845 the provisions of the Act of 1843 are extended to all associations and companies whatever, except banks and insurance companies; and the individual members of all such incorporations are made personally liable for all the contracts of said associations or companies. Ibid.

The argument against the validity of the charter of the Franklin Bridge Company, created under these statutes, is this:—

- 1. That in England, corporations are created and exist by prescription, by Royal Charter, and by Act of Parliament. With us they are created by authority of the Legislature, and not otherwise. That to establish a corporation is to enact a law; and that no power but the legislative body can do this.
- 2. That legislative power is vested under our Constitution, in the General Assembly, to consist of a Senate and House of Representa-

tives, to be elected at stated periods by the citizens of the respective counties.

3. And that the General Assembly is bound to exercise the power of making laws thus conferred upon them by the people in the primordial compact, in the mode therein prescribed, and in none other; and that a law made in any other mode is unconstitutional and void. That the Legislature is but the agent of their constituents; and that they cannot transfer authority delegated to them to any other body, corporate or otherwise,—not even to the Judiciary, a co-ordinate department of the government, unless expressly empowered by the Constitution to do so. That to do this would be to violate one of the fundamental maxims of jurisprudence as well as of political science, namely, delegata potestas non potest delegari. That to do this would not only be to disregard the constitutional inhibition which is binding upon the representative, but by shifting responsibility introduce innovations upon our system, which would result in the overthrow and ultimate destruction of our political fabric.

The constitutional inquiry thus presented is an exceedingly grave one. It reaches far beyond the case made in the bill of exceptions, and extends to the whole range of topics which fall under legislative cognizance. In the view we take however of the statutes before us, no such proposition as that which has been discussed is presented for our adjudication. And we rejoice that it is so, not only on account of the delicacy of the task, in pronouncing an act of Legislature unconstitutional and void, - one which is never justifiable unless the case is clear and free from doubt; and even then one might almost be forgiven for shrinking from the performance of a duty which would be productive of such incalculable mischief and confusion. Bridges have been built at a heavy expense; manufacturing and innumerable other associations have been formed in Georgia, and are in full operation, under charters incorporated under this law. And in view of the consequences any court might hesitate, unless the repugnance between the statute and the Constitution was so palpable as to admit of no doubt, and produce a settled conviction of their incompatibility with each other.

4. It was formerly asserted that in England the act of incorporation must be the *immediate* act of the king himself, and that he could not grant a license to another to create a corporation. 10 Reports, 27. But Messrs. Angell and Ames, in their Treatise on Corporations, state that the law has since been settled to the contrary; and that the king may not only grant a license to a subject to erect a particular corporation, but give a general power by charter to erect corporations indefinitely, on the principle that qui facit per alium facit per se; that the persons to whom the power is delegated of establishing corporations, are only an instrument in the hands of the government. 1 Kyd, 50; 1 Black. Com.; Ang. & Am. 63.

Before the revolution, charters of incorporation were granted by the

proprietaries of Pennsylvania under a derivative authority from the Crown; and those charters have since been recognized as valid. 3 Wilson's Lectures, 409. A similar power has been delegated by the Legislature of Pennsylvania with regard to churches. 7 S. & R. 517. The acts of the instrument in these cases become the acts of the mover, under the familiar maxim above mentioned. See also 1 Missouri R. 5.

5. Our opinion is that no legislative power is delegated to the courts) by the acts under consideration. There is simply a ministerial act to be performed, - no discretion is given to the courts. The duty of passing the rule or order directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made obligatory upon the courts; and should they refuse to discharge it, a mandamus would lie to coerce them. is true the Legislature has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way. Under the Free Banking Law of 1838, instead of petitioning the court, and having the order passed and entered upon its minutes, the certificate specifying the name of the association, its place of doing business, the amount of its capital stock, the names and residence of the shareholders, and the time for which the company was organized, is required merely to be proven and acknowledged, and recorded in the office of the clerk of the Superior Court, where any office of the association is established, and a copy filed with the Comptroller General. Cobb's Digest, 107, 108.

And so under the Act of 1847, authorizing the citizens of this State, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges. persons who propose to embark in that branch of business are required to draw up a declaration specifying the objects of their association and the particular branch of business they intend carrying on, together with the name by which they will be known as a corporation, and the amount of capital to be employed by them; which declaration is required to be first recorded in the clerk's office of the Superior Court of the county where such corporation is located, and published once a week for two months in the two nearest Gazettes; which being done, it is declared that said association shall become a body corporate and politic, and known as such, without being specially pleaded, in all courts of law and equity in this State, to be governed by the provisions and be subject to the liabilities therein specified. Cobb's Digest, 439, 440.

In these two instances, and others which might be cited, the Legislature have dispensed with the action of the courts, or of any other agency, to carry out their enactments with regard to these various associations which have become the usual and favorite mode of conducting the industrial pursuits of the civilized world in modern times.

All these Statutes were complete as laws when they came from the hands of the Legislature, and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as the filing the petition or declaration, and giving publicity to the purpose of tne association in the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test! For it requires the acceptance of the charter to create a corporate body; for the government cannot compel persons to become an incorporated body without their consent. And this consent, either express or implied, is generally subsequent in point of time to the creation of the charter. And yet, no charter that we are aware of has been adjudged invalid, because the law creating it and previously defining its powers, rights, capacities, and liabilities, did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified.

The result therefore of our deliberation upon this case is, that the Acts of 1843 and 1845, vesting in all associations, except for banking and insurance, the power of self-incorporation, do not impugn the Constitution, and that the charter of the Franklin Bridge Company and all others created under them, and in conformity to their provisions, are legal and valid. With the policy of these Statutes we have nothing to do. The province of this and all other courts is jus dicere, not jus dare.

Judgment reversed.

Under the common law of England and the United States a corporation cannot be formed, like a partnership, merely by a contract between the individuals composing it. The right of forming a corporation and of acting in a corporate capacity must be treated as a franchise, or special privilege, which may not be assumed without a grant of authority from some governing power.

In England the right of forming a corporation may be granted either by the king alone or by act of Parliament. . . .

In the United States, where written constitutions define the powers of the several branches of the government, the power of chartering corporations belongs to the legislature only. It is a power which belongs to the legislature, unless expressly taken away by the Constitution, and is incidental to the general power of making laws for the welfare of the State.

Congress has power to grant a charter of incorporation whenever this is an appropriate measure for carrying out any of the authorized purposes of the Federal government. . . .

In many of the States the legislature is prohibited by constitutional provision from granting corporate franchises except in accordance with certain prescribed rules. Thus it is provided, in many instances, that no charter of incorporation shall be granted by special act, and

that corporations shall be formed only in accordance with general laws.

1 Morawetz on Private Corporations, 2d edition, ss. 8, 9, and 10.

For a collection of constitutional provisions, restraining the legislature from granting special charters or from passing special acts conferring corporate powers; see 1 Thompson on Corporations, ss. 539, 540.

A charter is the instrument which creates the corporation. It formerly was granted by the king. Later it was granted by an act of the legislature — a separate act being passed for each charter. At present the constitutions of many of the states require that in all possible cases the legislature shall pass general acts whereby, by the simple filing of a prescribed instrument, persons may form a corporation without applying to the legislature at all. These general acts specify the contents of the instrument to be filed, and specify also the powers of the corporation. A charter is special act of the legislature creates the corporation. A charter is under the general act, when it consists of a certificate of incorporation filed with the public authorities in accordance with a general act of the legislature allowing corporations to be formed in that manner.

Cook on Corporations, 4th edition, s. 2.

The differences between an enabling statute and a charter are, however, mainly differences in form. A charter as well as an enabling statute prescribes rules for conduct; the difference being that these rules in the case of a charter have a more limited application. And an enabling statute, as well as a charter, proffers terms and facilities of action which are accepted by the corporators by filing their articles of association; only in the case of an enabling statute the terms are offered to the citizens of the state at large, any sufficient number of whom may accept them and incorporate themselves by complying with them.

Taylor on Private Corporations, 3d ed. s. 451.

At the present day corporations are usually formed by the adoption of articles of association and the subscription of capital, in pursuance of general incorporation laws enacted by the legislature. The articles of association of a company thus organized, taken in connection with the laws under which the organization takes place, form the constitution of the association, and answer the same purposes as a special charter.

1 Morawetz on Private Corporations, 2d ed. s. 318.

General incorporation laws are now almost universal, and their utility is so manifest that few corporations are created by special

acts, even in states where such legislation is not forbidden. In future the law of the creation of corporations will be the law of the formation of corporations under general laws. The same is true as to the law of corporate existence.

Note in 12 Lewis' Amer. R. R. & Corporation Reports, p. 474-475.

No form of words is required in order to create a corporation. A grant of the power to perform corporate acts, implies a grant of corporate powers. . . .

Lewis, J., in Com. v. Westchester R. Co., 3 Grant's Cases, Pa. 200,

p. 202.

- ... this word *incorporo*, or any derivative thereof, is not in law requisite to create a corporation; but other equivalent words are sufficient...
- ... to the creation of an incorporation the law had not restrained itself to any prescript and incompatible words.

The Case of Sutton's Hospital, 10 Coke's Reports, 23, pp. 30 a, 30 b.

SECTION II.

Acceptance of Charter.

STATE v. DAWSON ET ALS.

1861. 16 Indiana, 40.

Appeal from the Clark Circuit Court.

PERKINS, J. Information against the defendants, charging that they are pretending to be a corporation, and to act as such, when they are not a corporation. It charges that in January, 1849, the Legislature of the State of Indiana enacted a special charter of incorporation, (which is set out at length,) for a railroad from Fort Wayne, Indiana, to Jeffersonville, to be called the Fort Wayne and Southern Railroad; that the persons named in the charter as directors did not accept said charter till June 2, 1852, when they did meet and accept the same, and organize under it. It is alleged that the defendants are assuming to act under said charter, never having organized under any other. The court below sustained a demurrer to the information; thus holding the defendants to be a legal corporation.

The present Constitution of Indiana took effect on November 1,

1851. It contains these provisions:—

"All laws now in force and not inconsistent with this Constitution, shall remain in force, until they shall expire or be repealed." Sched. (1 sub. sec.) of Const.

"Corporations, other than banking, shall not be created by special \ act, but may be formed under general laws." Art 11, \\$ 13.

"All acts of incorporation for municipal purposes shall continue in force under this Constitution, until such time as the General Assembly) shall, in its discretion, modify or repeal the same." Sched. supra, sub. sec. 4.

The charter for the Fort Wayne and Southern Railroad was not a charter for municipal purposes, and, hence, was not specially continued in existence. Art. 11, § 13, above quoted, prohibits the creation of a corporation by special act or charter, that is, as we construe the prohibition, through, or by virtue of, such special act or charter, after November 1, 1851. The policy that induced the prohibition, as well as its literal import, demands this construction. It is necessary for us toy ascertain, then, when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation, by the Legislature, did not create the corporation. It required one act on the part of the persons named in the charter to do that, viz: acceptance of the charter enacted.

Says Grant, in his work on corporations, vide p. 13: "Nor can a charter be forced on any body of persons who do not choose to accept it." And again, at page 18, he says, "The fundamental rule is this: no charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it. Bagge's case, 2 Brownl. & G. 100; S. C. 1 Roll. Rep. 224; Dr. Askew's case, 4 Burr. 2200; Rutter v. Chapman, 8 M. & W. 25; per Wilmot, J., Rex v. Vice-Chancellor of Cambridge, 3 Burr, 1661. This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate. Townson v. Tickell, 3 B. & Ald. 31." See, also, Ang. & Am. § 83, where it is said, if a charter is granted to those who did not apply for it, the grant is said to be in fleri till acceptance. We need not inquire whether this rule extends to municipal corporations in this country. As to what may constitute an acceptance we are not here called on to decide, as the information expressly shows that there was none in this case till June, 1852, which fact is admitted by the demurrer.

The grant of the charter in question, then, to those who had not applied for it, was but an offer, on the part of the State; a consent that the persons named in the charter might become a corporation, might be created such an artificial being, by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made by the State, in 1849, was withdrawn by the State, November 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her Legislature would prescribe.

This pretended corporation, then, was not created before *November* 1, 1851; and it could be created afterward only by the concurrent consent of the State and the corporators. But, at that date, the Constitute

tion prohibited both the State and corporators from giving consent to such a corporation, to wit: one coming into existence through a special charter; and hence necessarily prohibited the creation thereof. This decision accords with that of the Supreme Court of the United States in Aspinwall v. Daviess County, 22 How., p. 364; where it was held that the new Constitution prohibited a subscription of stock to the Ohio and Mississippi Railroad Company, authorized by the charter of the corporation, granted under the former Constitution, and actually voted by the people of the county, under that Constitution.

Whether, as a matter of fact, the charter in this case was accepted under the old Constitution, must be determined on a trial of the cause below.

Had the provision in our Constitution, like that on this subject in the Constitution of *Ohio*, ordained that the Legislature should "pass no special act conferring corporate powers," the restraint would clearly have been imposed alone upon future legislative action; but, in our Constitution, the restraint is plainly imposed upon the creation, the organization, of the corporation itself. See *The State* v. *Roosa*, 11 O. St. R. 16.

Per Curiam. The judgment is reversed, with costs. Cause remanded for further proceedings in accordance with this opinion.

C. B. Smith, J. W. Gordon, and Watt J. Smith, for the appellant. R. Crawford, for the appellees.

REX v. WESTWOOD.

1825. 4 Barnewall & Cresswell, 781.1830. 7 Bingham, 1.2

Quo Warranto for usurping the office of burgess of the borough of Chepping Wycombe. It was admitted on the pleadings that the corporation of Chepping Wycombe has existed from time immemorial. Plea, alleging, inter alia, defendant's election by a select body of the burgesses, according to the custom from time immemorial. Replication, setting out a charter granted by the Crown in 15 Charles II., whereby it was granted that the entire body of burgesses should and might be able to elect new burgesses. Rejoinder, that said charter was not accepted by the then burgesses as to that part thereof which ordained the mode of electing new burgesses. Demurrer.

Scarlett, in support of demurrer.

Tindal, contra.

1 Citations of counsel for appellees are omitted. — ED.

² Statement abridged. Arguments omitted. Only so much of the case is given as relates to one point.—ED.

LITTLEDALE, J. . . . But then the rejoinder says the charter was not accepted in that part which relates to the election of the burgesses. 1 think that rejoinder is bad, because I think a corporation cannot accept a charter in part only. When a charter is given by the crown, it is considered as forming a whole scheme formed upon deliberation for the good government of the borough. Some parts of this may not be what the corporation may like in themselves; but the crown, on the other hand, may have granted them other valuable privileges as a sort of compensation for the inconvenience and trouble they might suffer from other parts. But the corporation would never have had the valuable parts unless they had had some of the troublesome ones also. The King v. The Vice Chancellor of Cambridge, 3 Burr. 1647, it was considered by Lord Mansfield, that a corporation might accept a char-In page 1656, he says, "but there is a vast deal of ter in part. difference between a new charter granted to a new corporation (who must take it as it is granted) and a new charter given to a corporation already in being, and acting either under a former charter, or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter in toto, and to receive either all or none of it; they may act partly under it, and partly under their old charter or prescription." And Mr. Justice Wilmot, 3 Burr. 1661, says, "It is the concurrence and acceptance of the university that give the force to the charter of the crown, and they may take and accept the body of statutes or code of laws separately and distinctly; they are not bound to take all, or leave all." But though such is the law laid down it was not necessary to do so, because the office of High Steward was an ancient office existing long before the statutes of Queen Elizabeth, and from the language of those statutes, it is plain, the crown did not mean to interfere with the mode of electing the ancient officers in the university, except such as were particularly mentioned; and a question lately arose in this court upon the construction of one of those statutes, whether a particular professorship fell within the meaning of it, viz., that all officers where the mode of election was not pointed out, should be elected as the Vice-Chancellor. That was not a general charter given to the university to form the whole constitution of it, but a selection of statutes for the election of particular officers, and it is by the aggregate of different statutes given at different times by the crown, that the university is governed. In The King v. Amery, 1 T. R. 589, Buller, J., says, "The averment proceeds on a mistake by supposing that a charter may be accepted in part and rejected as to the rest. The only instance in which I have ever heard it contended that a charter could be accepted in part only, is where the king has granted two distinct things, both for the benefit of the grantees; there I know that some have thought that the grantees may take one, and reject the other. However that may be, it cannot extend to this case. This corporation must either have accepted in toto, or not, at all. If they could have accepted a part only of the charter, they would have been a corporation created by themselves, and not by the hing. If a charter directed that the corporation should consist of a mayor, aldermen, and twenty-four common councilmen, they could not accept the charter for the mayor and aldermen only, omitting the common councilmen." There not being any case where I consider the point as having distinctly come in judgment, there are only the opposite dicta of judges to guide us, and then I must give my judgment in that way which appears most consonant to the general principle of law as applicable to grants of the crown, that the grantees must take the whole of one entire thing which the crown grants, or none at all. Therefore, the rejoinder is no answer to the replication to the first and second pleas, and judgment must be for the crown on that part of the record.

[Omitting other opinions.]

Judgment for the Crown on the first two pleas. For the defendant upon the third plea.

[A writ of error was brought to the House of Lords, where it was argued that the judgment ought to be reversed upon another point.

LORD TENTERDEN delivered an opinion, from which the following is an extract.]

Two questions of law, therefore, have arisen upon this record; the first, whether it is competent to an existing corporation, to whom a charter of the crown is offered, to accept that charter in part and reject it in part; or if it accept it in part, whether that must not be taken to be an acceptance of the whole? Upon that point there never has been any difference of opinion among the learned Judges. There are, indeed, to be found some expressions of Judges in former times importing that a corporation might accept part of a charter and reject the remainder; but of late times all Judges have been of opinion that it is not open to a corporation; otherwise a corporation might reject the obligation which was imposed, and accept the benefit which was conferred upon them; and accordingly there was judgment in the court below for the crown upon that point, namely, that the allegation that the charter was accepted in part was a bad allegation.

Judgment affirmed.

ELLIS v. MARSHALL.

1807. 2 Massachusetts, 269.1

EJECTMENT. The plaintiff claimed under a sale by the "Front Street Corporation in the town of Boston," established by a law of the Commonwealth, passed March 6, 1804.2 By this statute sundry persons, and amongst them the defendant, Marshall, described as "being owners and proprietors of the lands and flats over which the said street will pass, and of the lands and flats adjoining thereto," are incorporated for the purpose of making a street in the town of Boston. By the third section of the statute, the corporation are authorised to assess upon all the owners and proprietors of said land and flats, according to the proportion they severally hold therein, such sums of money as shall be agreed upon by the said proprietors, or the major part of such of them as shall be assembled at any legal meeting to be called for that purpose; and if any of the said proprietors shall neglect or refuse to pay the sums of money duly assessed upon him therefor, for the space of three months, the proprietors are authorized to sell, at public auction, so much of such delinquents share of said lands and flats as shall be sufficient to pay the sums so assessed, and the charges of sale: and the said proprietors may, by their clerk or committee, execute a good deed to the purchaser in fee simple.

Marshall was not one of the petitioners for the act of incorporation;

never assented to the petition; and never attended a meeting of the corporation.

It was agreed, "that, on the tenth day of October last, the land demanded in this action, being part of the said Marshall's estate adjoining said street, was sold at public auction, according to the rules and regulations of the Corporation, and the powers granted in said act, for the purpose of raising the amount of the assessment taxed on him by said Corporation, as being towards his proportionate part of the expence of making said street, which, though often requested, he had refused to pay, and a deed of conveyance thereof was accordingly given by said Corporation to said Ellis, to hold the premises demanded, to him in fee simple."

"If on the foregoing facts the court should be of opinion that the said Corporation could, by virtue of the said act, legally assess the said *Marshall*, and sell his lands for non-payment thereof, then it was agreed that the defendant should be defaulted, and judgment should be rendered for the plaintiff; otherwise the plaintiff was to become nonsuit, and judgment be rendered for the defendant."

Parsons and Dexter, for plaintiff.

The Attorney General, Sullivan, and Amory, for defendant.

² 3 Mass. Special Laws, 375.

¹ Statement abridged. Arguments and part of opinion omitted. - ED.

PARKER, J. From the foregoing facts and the arguments thereon by the counsel, it appears that all the proceedings of the corporation relative to the assessment and sale were correct; so that if *Marshall* were, at the time thereof, a member of the corporation, the title to the demanded premises in *Ellis* could not be disputed.

We are therefore necessarily brought to the question, indeed the only one in the case, whether *Marshall*, by virtue of the act aforesaid, became a member of the said corporation, subject to its rules and regulations, and liable to be assessed for the purpose of building said street.

The counsel for the plaintiff have contended

1st. That by virtue of the act itself, Marshall being named therein, he became ipso facto a member of the corporation, the Legislature having competent power to compel him thereto:

2dly. That should this not be the case, the foregoing facts contain sufficient evidence of his consent, tacit at least, to the passing of said act, and the insertion of his name therein.

The determination of the first point requires that we should ascertain the true nature and character of this legislative proceeding. If it were a public act, predicated upon a view to the general good, the question would be more difficult. If it be a private act, obtained at the solicitation of individuals, for their private emolument, or for the improvement of their estates, it must be construed, as to its effect and operation, like a grant. We are all of opinion that this was a grant or charter to the individuals who prayed for it, and those who should associate with them; and all incorporations to make turnpikes, canals and bridges must be so considered.

Can then one, whose name is by mistake or misrepresentation inserted in such an act, refuse the privileges it confers, and avoid the burthens it imposes? If he cannot, then the Legislature may, at all times, press into the service of such corporations those whose lands may be wanted for such objects, whenever they may be prevailed on to insert the names of such persons, by the intrigue or mistake of those more interested in the success of the object. No apprehension exists in the community that the Legislature has such power. That the land of any person, over or through which a turnpike or canal may pass, may be taken for that purpose, if the Legislature deem it proper, is not doubted. The constitution gives power to do this, provided compensation is made. But it was never before known, that they have power over the person, to make him a member of a corporation, and subject him to taxation, nolens volens, for the promotion of a private enterprise.

That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear, to require the support of authorities. That he may decline to improve his land, no one will doubt. Although the Legislature may wisely determine that a certain use of his property will be highly beneficial to him, he has a right to

judge for himself on points of this nature. The fact therefore in the case, that *Marshall* is benefitted equally with the other owners by the making of this street, is of no importance.

It being then the opinion of the court that this act is of a nature to require the assent of *Marshall*, either express or implied, before it can operate upon him, it is necessary to enquire into the second point, viz., whether the facts agreed on in this case furnish evidence of such assent.

Upon the whole, therefore, we are of opinion that the act under which the plaintiff sets up his title, could not bind *Marshall* without his assent: that he having uniformly, whenever opportunity occurred, signified his dissent, is not a member of the corporation it created, was not liable to their assessments, and therefore that the sale of his land was without authority of law and is void.

Plaintiff nonsuit.

STATE v. BULL.

1844. 16 Connecticut, 179.1

Information in the nature of a quo warranto, to test the right to exercise certain corporate franchises.

In 1833, the legislature passed an act to authorize the formation of a corporation to carry on the business of insurance. Among the provisions of the act are the following: the capital is to be \$100,000, divided into shares of \$20 each; subscriptions to the stock shall be opened under the superintendence of seven commissioners, named in the act, at such times and places as they shall appoint; there shall be paid to the commissioners at the time of subscription \$1.00 on each share subscribed; the subscriptions shall continue open three days; in case the subscriptions shall not amount to \$100,000, the subscriptions to complete said sum may remain open, or be opened anew, at some subsequent time or times as the commissioners shall determine, and further subscriptions may then be made to complete the amount; after the stock shall have been fully taken up, the subscribers, their successors and assigns, shall be, and are hereby, created a corporation by the name of the Connecticut Life and Fire Insurance Company.

In June, 1833, the commissioners opened subscriptions, giving due notice of the time and place, and the subscriptions were kept open for the time prescribed in the act. The subscriptions amounted to only \$15,000. The subscriptions were thereupon closed; and the commissioners then, or soon after, refunded to the subscribers the sum of one dollar which they had paid on each share.

¹ Statement abridged. Arguments and part of opinion omitted. - ED.

Nothing further was attempted to be done under the act, until March 16, 1844, when the commissioners, without giving any public notice, opened subscriptions anew. Three persons then subscribed for the entire capital stock. Thereafter the holders of the shares so last subscribed met, elected directors, claimed to be a corporation, and proposed to engage in the business of insurance.

To the information setting out, in substance, the foregoing facts,

there was a general demurrer.

T. C. Perkins, in support of the demurrer.

Hungerford and Toucey, contra.

Church, J. The commissioners appointed under this charter, to receive subscriptions to the stock of the proposed Insurance Company, were the agents of the state, empowered to offer an act of incorporation to such as would accept it, upon the terms and conditions proposed.

The legislature was influenced in granting the charter, by what it supposed the public interest, at that time, required. We cannot presume, that it was enacting a supernumerary charter, to be laid away among the state records, to await either the convenience or necessity of future times. Nor can we, without great disrespect, suppose it intended to give opportunity for the exercise of favouritism, or to prevent competition in subscriptions.

[The learned Judge then held, that public and general notice should have been given whenever the books for subscription were opened

anew. The opinion then proceeds.]

The foregoing considerations are decisive of our opinion on this subject. But there are others, which confirm it. The commissioners, who had been appointed, in view of the state of things then existing, performed the duty required of them. They offered the charter for public acceptance; and it was declined. They restored to the subscribers all they had advanced, and abandoned the project. In the meantime, perhaps, other corporations may have been created, to supply the public necessities, which once were supposed to exist; and the legislature have not again spoken on the subject. Under these circumstances, and because this charter was not accepted within a reasonable time, we think the trust conferred upon the commissioners must be considered as having been surrendered; and that it cannot be resumed, now, without a renewed expression of the will of the legislature.

We hold the information to be sufficient.

Demurrer overruled.

SECTION III.

Conditions precedent to Incorporation De Jure. "One Man Company."

PEOPLE v. MONTECITO WATER CO.

1893. 97 California, 276.

[In Department Two.¹] Appeal from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion.

John J. Boyce, Richards & Carrier, and George H. Gould, for appellant.

W. C. Stratton, for respondents.

Temple, C. Plaintiff appeals from a judgment entered upon demurrer to complaint. The demurrer was general, and on the ground of insufficiency of the facts. It is a proceeding taken by the attorney general of the state, in the nature of a quo warranto, to deprive the defendant corporation of its corporate charter, and procure its dissolution on two grounds — First, for want of a substantial compliance with the statutory requirements in its formation; and second, for abandonment and misuse of its corporate franchise and powers, and for alleged violations of law.

In answer to the first point the respondent raises the preliminary objection that, by making the corporation a defendant, its corporate character is admitted, and cannot be questioned in this proceeding. As authority for this proposition the case of the People v. Stanford, 77 Cal. 360, 18 Pac. Rep. 85, and 19 Pac. Rep. 693, is chiefly relied upon. In that case it was alleged in the complaint that the assumed corporation had never been a corporation. If it were not a corporation of any character, it had no legal existence, and could not be sued. By making it a party, plaintiff conceded that it was a person that could be sued. It was said that the corporation could not be treated as a person which could be sued simply to obtain a judgment; that it was not and never had been such a person. There is no such inconsistency here. averred that the corporate defendant is a corporation de facto, but it is claimed that it did not become a corporation de jure, because the persons who attempted the incorporation did not comply with the conditions which the statute makes conditions precedent to its rightful incorporation. Under such circumstances, although the association is a legal entity, which may be sued, its right to corporate existence may be questioned by the state in a proceeding of this character. Section 358, Civil Code. This court said in People v. La Rue, 67

¹ As to the Departments of the Supreme Court, and as to Supreme Court Commissioners, see Preface to 97 California, pp. v-vii

Cal. 530, 8 Pac. Rep. 84, and repeated the language in First Baptist Church v. Branham, 90 Cal. 22, 27 Pac. Rep. 60: "A corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world, except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." Under such circumstances it seems clear that the corporation is not only a proper, but a necessary party. People v. Flint, 64 Cal. 49, 28 Pac. Rep. 495; People v. Gunn, 85 Cal. 244, 24 Pac. Rep. 718.

It is contended that the corporation is not rightfully such because, while five incorporators signed the articles of incorporation, only four acknowledged the same. Section 292 of the Civil Code reads as follows: "The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this state, and acknowl edged by each before some officer authorized to take and certify acknowledgments of conveyances of real property." It was said in People v. Selfridge, 52 Cal. 331: "The right to be a corporation is in itself a franchise; and, to acquire a franchise under a general law, the prescribed statutory conditions must be complied with." Still, a substantial, rather than a literal, compliance will suffice. People v. Stockton & V. R. Co., 45 Cal. 313. Was there substantial compliance in this case? Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted, on the ground that it is unimportant. They are conditions precedent to acquiring a statutory right, and none can be dispensed with by the court. What is a substantial, rather than a literal, compliance, may be illustrated from the cases. In Ex parte Spring Valley Waterworks, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the "principal place of business," as required. The court said: "The statement that San Francisco was the place of business would seem to imply that it was not only the principal, but the only, place of business." In People v. Stockton & V. R. Co., 45 Cal. 306, the affidavit required in such cases to be attached to the certificate stated that 10 per cent of the amount subscribed had been actually paid in, omitting the words "in good faith," which the statute required. In the certificate it was stated that more than 10 per cent had been actually in good faith paid in. It was held sufficient, and it would seem that, if it was actually paid in cash, it must have been paid in good faith; and it was further held that payment by checks drawn against sufficient funds in a bank, which was ready to accept and pay the checks, was substantially payment in cash. In People v. Cheeseman, 7 Colo. 376, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons

who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with the requirement, although the form prescribed for acknowledgments to deeds was not followed. It was acknowledged. In all these cases it will be seen that the thing required was done, but not literally as directed; but there was no omission of any requirement. No case has been cited where the entire omission of a thing prescribed has been excused, unless it be the case of Larrabee v. Baldwin; 35 Cal. 155. That was not an action instituted by the state to disincorporate on the ground of noncompliance. As we have seen, unless the state complains, a de facto corporation must be considered, under our Code, as possessing a corporate character; and the stockholders, when sued upon their individual liability, should not be allowed to make the point that they did not comply with the law. that case the certificate was signed by five directors, but two failed to acknowledge it. Other questions are discussed at great length in the opinion, but in regard to the point made on the certificate it was simply remarked: "It is not clear that any fatal defect exists in the certificate of incorporation. If so, it is cured by the act of April 1, 1864." Plainly it was unnecessary to consider the question. The curative act referred to declares: "All associations or companies heretofore organized, and acting in the form and manner of corporations, and that have filed certificates for the purpose of being incorporated, but whose certificates are in some manner defective, or have been improperly acknowledged before a person not authorized by law to take such acknowledgments, are hereby declared to be, and to have been, corporations from the date of the filing of such certificates, in the same manner and to the same effect and intent as if such certificates were without fault, and properly acknowledged before the proper officer; and all such certificates are hereby validated, and declared to be legal, and shall have the same force and effect as if such certificates were free from all fault or defect, and were properly acknowledged," etc. St. 1863-64, p. 303. Section 292 of the Civil Code requires the articles to be subscribed and acknowledged by each. As this is an express condition precedent to a valid incorporation, it is not of consequence to the court whether it be a wise or necessary requirement or not. Still, it is easy to see a reason for it. The certificate secures the state, and all concerned. against the possibility of any fictitious names being subscribed to the articles, and furnishes proof of the genuineness of the signatures. If the acknowledgment can be dispensed with as to one, why not as to two or three, or all? Ordinarily, no doubt, the state would not be expected to institute a proceeding of this character for such a defect alone, and we must presume that the attorney general would not have instituted this inquiry if he were not convinced that there were reasons sufficient to justify it. Other reasons are alleged; but, as the statute authorizes a proceeding to forfeit the charter where the statute has not been complied with, although the corporation is acting in good faith, and is a de facto corporation, the complaint must be held to state a cause of action, and the demurrer should be overruled. The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

DE HAVEN, J., McFarland, J., Fitzgerald, J.

NEWCOMB v. REED.

1866. 12 Allen, 362.

Contract, in which the plaintiff sought to charge the officers of the Boston Mechanical Bakery Company with a debt contracted in the name of the corporation, in consequence of their neglect to file certificates and statements of the condition of the corporation. At the trial in the superior court, before *Ames*, J., without a jury, the judge found for the defendants upon facts which are stated in the opinion; and the plaintiff alleged exceptions.

C. B. Goodrich & E. Avery, for the plaintiff.

E. Merwin, for the defendants.

HOAR, J. The defence to this action rests wholly upon the assumption that the corporation, whose officers the plaintiff seeks to charge with a statute liability for its debts, never had a legal existence. The only defect suggested in the organization of the corporation is, that the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them, as required by St.~1855,~c.~140.

The case of Utley v. Union Tool Company, 11 Gray, 139, is the authority on which the defendants chiefly rely. That case decided that in order to charge as stockholders of a manufacturing corporation persons who had been summoned in an action against it under St. 1851, c. 315, the plaintiff must prove the legal existence of the corporation. The alleged corporation had no charter or act of incorporation from the legislature, but was an association which had undertaken to assume corporate powers under a general act for the formation of joint stock companies, St. 1851, c. 133. That statute authorized three or more persons who had entered into "articles of agreement in writing" for the transaction of certain kinds of business, to organize in a manner prescribed, and thereby to become a corporation; and the court were of opinion that written articles of agreement were essential to constitute a corporation, and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which and

the place in which the corporation was established. The court say, "There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." And they add that "it is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons liable therefor as stockholders."

We think these reasons have no application to the case now before us. In this, there was an act of incorporation from the legislature. There is no question that the corporate powers which it conferred were assumed by the persons by whom it was intended that they should be enjoyed, so far as they chose to avail themselves of them. The organization was not strictly regular, but can hardly be considered even as defective.

And if the object of the statute is regarded, by which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing an orderly method of organization. Thus, if all the persons interested should come together without any notice or call whatever, and proceed to accept the charter, and do the other acts necessary to constitute the corporation, we cannot doubt that their action would be valid, and that neither the public, nor any persons not belonging to the association, would have any interest to question their proceedings.

The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of *Lechmere Bank* v. *Boynton*, 11 Cush. 369, where two parties had attempted to organize separately under the same charter, each claiming to be the corporation.

There is nothing in the facts found and reported to show that all persons interested were not actually notified of the meeting for organization. On the contrary, it would seem that they were. No one has questioned the regularity of the proceedings, or claimed, as in Lechmere Bank v. Boynton, a right to organize in a different manner. The evidence was ample to show that the persons named in the act of incorporation with their associates, or at least all of them who desired to do so, have accepted the act, organized under it, issued stock, elected officers who have acted and served in that capacity, carried on business, contracted debts, and exercised all the functions of corporate existence. It is therefore too late to deny that the corporation ever had any legal existence, or for these officers to avoid the liabilities which the statutes of the Commonwealth impose.

The defendant Brackett, who was treasurer in February 1861, appears to have been liable with the directors under the provisions of Gen. Sts. c. 60, §§ 18, 20, 31.

Exceptions sustained.

CHERAW & CHESTER R. CO. v. WHITE.

1880. 14 South Carolina, 51.1

WILLARD, C. J. This action was brought to recover the amount of a subscription to the capital stock of the plaintiff company, alleged to have been made by the defendant, and not duly complied with on his part. The defendant demurred to the complaint on various grounds. This demurrer was overruled by the Circuit Court, and leave to answer granted on terms. From this decision the defendant now appeals.

The first ground of demurrer is, that the plaintiff has no capacity to sue. Several propositions are stated under this ground of demurrer that, in substance, involve the general proposition that the plaintiffs have received, by law, only authority to become a corporation upon the performance of certain conditions precedent, and that the complaint contains no allegations showing that such conditions have been

performed.

The act to charter the plaintiff company, passed February 27th, 1873, (15 Stat. 442,) confers corporate powers on the corporators named, in terms importing an immediate grant, with the following proviso annexed: "Provided that said persons shall commence operations upon said road within two years after the passage of this act, and complete the same within five years." The period of completion is stated by Section 6 at seven years, but this conflict of time is not material to the present question. The question is whether the proviso can have the effect to convert a grant of the corporate franchise, made in terms that import an immediate grant, into one taking effect only upon the happening of a certain contingency. If the purpose intended by the proviso cannot be fully accomplished without a limitation of the broad sense of the language conferring the franchise, then such effect can be accomplished consistently with the rules of construction, for, in that case, the proviso would be necessarily interpreted as a condition in substance and effect. As a condition subsequent this is undoubtedly the effect of the proviso, but does it contain, in itself, anything that imports a necessity that it should operate as a condition preced-

 $^{^{1}}$ Statement omitted. Only so much of opinion is given as relates to one point. — $\mathrm{E}_{\mathrm{D}}.$

dent? Two things are to be considered in this respect: First. What is essential to the full efficacy of the matter of the proviso itself? Second. What would be the effect of allowing it to stand as a condition precedent on the completeness of the powers granted for the purpose intended by the grant, and to which the terms of the proviso stand as a condition? It certainly was intended that the corporators should have all the powers and capacity properly incident to a railroad corporation for the purpose of enabling it to commence and complete the road in the times prescribed by the law, for it must be assumed that the construction of the road was deemed a public benefit, and that the acquisition of that benefit to the public was the true consideration of the grant, and, in this light, the proviso must be regarded as directly intended as a means of hastening its construction. This view also excludes the idea that the proviso was intended to limit the capacity or powers of the company to construct the road within the times prescribed for that purpose. It must certainly be assumed that the possession of corporate powers during the time that the company was organizing and acquiring the capital and credit requisite to construct the road was a material aid toward the accomplishment of that result. It is fair, then, to assume that the grant, in terms importing immediate corporate capacity, was intended to operate as such for the purpose of conferring on the corporation the most perfect means for accomplishing that which it was the purpose of the proviso to secure. So far then from its being essential to the efficacy of the proviso that the sense of the terms granting, directly, the corporate franchise should be narrowed, the purpose of the proviso is best subserved by holding these powers intact according to the terms in which they were granted. If, at the end of two years, the corporation had not commenced to construct the road, every object intended to be secured to the state and to the public, by the limitation, would be fully attained, even if the company had at once, upon the granting of the charter, become a corporation. The extinguishment of the franchise of building and operating a railroad would have followed, and the right to exercise the functions of a corporation would have fallen with it as an accessory. On the other hand if the grant is held to be subject to a condition precedent, by reason of the limitation as to commencing work in two years, the argument that would produce that result would go a step further and make the completion of the road a condition precedent. In that case the anomaly would be presented of a company undertaking the construction and completion of a work of such magnitude without the powers of a corporation, and only hoping to obtain such powers when the work had been accomplished. Such an intention cannot be ascribed to the statute. It is clear that the demurrer was properly overruled as it regards the ground just considered.

JOHNSON v. KESSLER.

1888. 76 Iowa, 411.

APPEAL from Bremer District Court.

Action in chancery to restrain the collection of a tax voted by the electors of a township in aid of the construction of a railroad. Upon a trial on the merits plaintiffs' petition was dismissed. They now appeal to this court.

Boies, Husted & Boies, for appellants.

Gibson & Dawson, for appellees.

Beck, J. I. Counsel for plaintiffs insist that the tax voted is void for the reason that, as the stock authorized by the articles of incorporation of the company to whom the tax was voted was not all subscribed or taken, the corporation was not in fact in existence. Counsel's position, expressed in their own language, is this: "It was I not in law a corporation until its required capital stock was subscribed." The ready answer to this objection is found in the statute. The purposes and objects of an incorporation is to clothe persons who associate themselves together for that purpose with authority and power to do lawful business as an individual. Code, sec. 1058. It is enacted that an incorporation may commence business as soon as its articles of incorporation are filed in the recorder's office. Id. sec. The corporation may, then, lawfully commence business, that is, exercise its corporate authority and power, — when its articles of incorporation are filed. Nowhere is there an intimation in the statute that this authority and power cannot be exercised until all of its stock has been subscribed. There is nothing in the articles of incorporation of the railroad company to which the aid was voted, providing that the company shall not begin business until a prescribed amount of stock shall have been subscribed. Peoria & R. I. Ry. Co. v. Preston, 35 Iowa, 115, cited by plaintiffs' counsel, interprets the power of an Illinois corporation, in the absence of any statute similar to our own, authorizing corporations to commence business upon filing articles of incorporation, or upon the happening of any other prescribed event.

[Omitting opinion on other points.]

Affirmed.

GAINES, J., IN NATIONAL BANK OF JEFFERSON v. TEXAS INVESTMENT CO.

1889. 74 Texas, 421, pp. 435-436.

But it is also insisted that the company was never legally incorporated because the capital stock was not subscribed and paid for by the promoters of the enterprise. That the Legislature contemplated that corporations organized under the statute under consideration should be conducted as stock companies, having their capital stock divided into shares, we think there can be no doubt. The law requires that the articles of incorporation shall show "the amount of capital stock, if any, and the number of shares into which [it] is divided." Rev. Stats., art. 567; see also arts. 590, et seq. Article 591 provides that the stock subscribed for shall be paid in such manner and in such installments as the board of directors may order. But we find no provision in the law making the existence of the corporation dependent upon the subscription to its stock or the payment therefor. On the contrary it is expressly provided that "the existence of the corporation shall date from the filing of the charter in the office of the Secretary of State." Rev. Stats., art. 570.

It follows, we think, that when the company filed its articles of incorporation with the Secretary of State, it became a corporation in law, and that the owners of its stock and the managers of its business can not be held liable as partners for debts contracted by it. This ruling is supported by authority. Laftin & Rand Powder Co. v. Sinsheimer, 46 Md. 315; Society Purim v. Cleaveland, 43 Ohio St. 481; First Nat. Bank v. Almy, 117 Mass. 476.

ASPEN WATER AND LIGHT CO. v. CITY OF ASPEN.

1894. 5 Colorado Appeals, 12.1

APPEAL from District Court of Pitkin County.

The statutes of Colorado provide that any three or more persons who may desire to form a company for carrying on any lawful business, may make, sign and acknowledge certificates in writing in which shall be stated certain specified things including the amount of capital stock, the number of shares into which it is divided, the number of the directors or trustees and the names of those who are to manage the affairs of the company for the first year of its existence. Such

¹ The statement is taken from a note in 12 Lewis' Amer. R. R. & Corp. Reports, page 518. Only part of the opinion is given. — Ed.

certificate is to be filed in each county in which the corporation does business and in the office of the secretary of state. 1 Mill's Stats. § 473. The next section in the original act provides that when the certificates have been filed as aforesaid, the secretary of state shall record and preserve the same and that a copy thereof duly certified by the secretary shall be evidence of the existence of such company. 1 Mill's Stats. § 475. A subsequent section provides that the corporate powers shall be exercised by a board of directors or trustees of not less than three nor more than thirteen, who shall respectively be stockholders in said company, and who shall (except the first year) be annually elected by the stockholders. The statute is silent as to how or when the subscription to the stock is to be taken and also as a to any further organization of the company, except that provision is made for the election of a president by the directors and for such i other officers as may be provided for in the by-laws. Proceedings were taken to form the Aspen Water and Light Company, and the statute appears to have been complied with so far as its positive requirements were concerned. But no stock was ever subscribed for or issued. The company obtained a grant of a franchise from the city of Aspen and some attempt was made to enter upon the construction of the works. But the city attempted to revoke or annul its franchise and forcibly prevented the company from proceeding with its work. Thereupon the company brought suit for damages.

James M. Downing, Porter Plumb, and Joseph W. Taylor, for appellants.

William O'Brien and R. G. Withers, for appellee.

Bissell, P. J. . . . "It only remains to determine the legal consequences which flow from the failure to complete the organization by the preparation, issue and sale of stock. In some states the General Incorporation Act provides that upon the filing of the certificate the persons who sign it, and their successors, shall become a body corporate, and be invested with certain powers. But even in a case like that the authorities hold that it only thereby becomes a quasi corporation, invested possibly with certain powers for certain limited purposes. In reality it becomes a corporation only in name. It is universally agreed that a corporation cannot exist without stockholders or members. As said by the learned Commissioner Pattison in Arkansas River, Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Col. 587; 32 Pac. Rep. 954, 'without organization and members, without officers and stockholders, a corporation is but a naked body.' 1 Mor. Priv. Corp. § 33. We are thus confronted with this situation: Conceding, ex gratia, that the Aspen Water and Light Company had an existence on the 27th of February, 1885, and was possessed of sufficient corporate capacity to render the grant contained in the ordinance operative to vest in that company the rights expressed when the organization should be complete, it remains true that at the time of the alleged breach, and the bringing of the suit, the grant had not

become operative. . . . The company never had any legal president and never had any legal secretary, and consequently the so-called contract was never executed. The statute provides (Gen. St. 1883, §§ 242-244) that the corporate powers shall be exercised by a board of directors or trustees, who must be stockholders of the company, and from which body a president may be elected. This is a statutory limitation upon the corporate power, and the governing body must, according to that statute, be composed of shareholders, and the president can only be rendered competent by possessing the same statutory qualification. Since it is true that no stock was ever subscribed for or issued by this company, and no agreement was established which obligated the promoters for the stock of the company so that they might be taken to be joint owners of all of it, it follows that there never was any board of directors competent to make a contract, nor any persons who could execute an agreement for the company. Under these circumstances, one of the first essentials of a valid contract is absolutely wanting. There was not at the date of the alleged breach, and there is not at the present time, any such corporation as the Aspen Water and Light Company. What the rights of the promoters may be, if any, is not before us for consideration. The suit was not brought by them, or in their behalf, but in the name and on behalf of a corpora tion without a legal existence."

[Remainder of opinion omitted.]

Affirmed.

DUER, J., IN PALMER v. LAWRENCE.

1849. 3 Sandford's New York Superior Court, 161, pp. 172-174.

Duer, J. . . . We proceed now to the direct consideration of the objections that are relied on; not that it is at all necessary that these objections should be answered, in order to justify the decision that we propose to make, but that the same, or similar objections, may not be raised in any future case that we may be required to determine. The construction of the general banking law, upon which the first objection proceeds, namely, that the actual payment of the capital must precede the making and filing of the certificate, we have no difficulty in rejecting. It is as unreasonable as it is novel. It is not required by the terms of the statute, and is inconsistent with several of its provisions. The third subdivision of the fifteenth section declares, that the certificate of the associates "shall specify the amount of the capital stock of such association;" and it is upon these few words — this narrow foundation — that the ingenious argument of the defendant's counsel was exclusively built; yet these words are so far from necessarily implying that the capital has been paid when the certificate is made, that it is only by a strained and violent interpretation that such a meaning

can be attributed to them. The terms "such association" are used throughout the law, as designating, not the individuals who agree to form the association, but the association itself when formed; an association clothed with all the powers and attributes that the statute confers; and we, therefore, cannot understand how such an association can have a capital before it exists. If the payment of its capital is to precede its existence, when, how, and to whom is it to be paid? From whom is the authority to receive it to be derived? Whose property is it until the association is organized? How is it to be secured in this interval? When, how, and to whom is it to be paid over? one of these questions is answered by the law as it stands, but we find it impossible to believe that any one of them would have been left unanswered, had the legislature intended that the payment of the entire capital should be a condition precedent to the existence of the association. We find it impossible to believe that such an intention, instead of being plainly and fully expressed, would have been left to be gathered, by a remote and doubtful implication. There are numerous acts of incorporation, many of which were quoted by the defendant's counsel, as showing the general policy of the state, in which the payment of a portion of the capital is made a condition precedent to the existence of the corporation; but, in every one of these acts, the persons to whom the payment is to be made are named or designated, and the time and mode of payment, and the disposition to be made of the moneys paid, are carefully prescribed; nor can we doubt that specific regulations of such manifest propriety would have been found in the general banking law had the legislature meant that the payment of the whole, or of any portion of the capital of an association, should precede its organization. We have said that the interpretation we reject is inconsistent with several provisions in the law; and it plainly is so. It is inconsistent with the provision in section 19th, that every person to whom shares of stock are transferred, shall succeed to the rights and liabilities of the original stockholder. It would be absurd to suppose that any liabilities are here meant, except such as directly relate to the shares themselves; and if the shares have already been fully paid for, none such can exist. It is inconsistent with the provision in section 26th, that the semi-annual statement to be made to the comptroller shall "specify the amount of the capital paid in, or secured to be paid;" for if the whole capital has been paid, no portion can remain for which security is to be given. If the whole capital has been paid, and then loaned by the company, each loan is an investment of capital paid, not a security for its future payment; and every such investment would appear, in the statement to the comptroller, among the debts due to the association, not as a part of its unpaid capital. We do not doubt that the whole capital of an association must be paid, or secured to be paid, when it is organized: but it is secured to be paid, in the sense of the law, by force of the subscriptions of the associates, just as certainly as if each associate

had given his note or bond for the amount of his shares. The security may not be adequate, but it exists; and of its adequacy the public has been wisely left to judge.

PEOPLE v. CHAMBERS.

1871. 42 California, 201.1

APPEAL from District Court. Decision below for defendants.

Action of *quo warranto* against the defendants, claiming to compose the "Oroville and Virginia City Railroad Company," in which the defendants are charged with usurping the functions of a railroad company, without having been duly and properly incorporated as such.

Section 1, of Act of May 20, 1861 (Statutes of 1861, p. 607), requires as a preliminary to the organization of the company, that stock to the amount of at least \$1000 per mile of the proposed road shall be subscribed "and ten per cent in cash so required to be subscribed shall be actually and in good faith paid to a Treasurer to be named and appointed by said subscribers from among their number." In the present case, the greater part of the ten per cent was not paid in cash, but was paid in a check drawn by one Bolinger on the Bank of California. Bolinger had not sufficient funds on deposit in that Bank to meet the check, and the check never was presented for payment.

Van Clief & Gear, for appellant.

Haymond & Stratton, for respondents.

CROCKETT, J. [After discussing the facts and holding that the check could not be considered as payment in cash, even though it be conceded that the check would have been paid had it been presented.]

Counsel insist, however, that the provision in respect to the prior subscription of stock, and the payment of the ten per cent, is directory only, and that the payment is not a condition precedent, the performance of which is essential to the validity of the act of incorporation, and in support of this proposition we are referred to the case of Commonwealth v. Westchester Railroad Company, 3 Grant, Pa. 200. But that decision was founded on a special statute, in many respects essentially different from ours, and does not sustain the position here contended for. But if it was directly in point, we would not be inclined to follow it. On the other hand, I think it is apparent that without a substantial compliance with this provision the subscribers acquired no jurisdiction to organize themselves into a corporate body, and this view of the law is supported by the following authorities:

Eaton v. Aspinwall, 19 N. Y. 119; People v. Troy House Company, 44

¹ Statement abridged. Arguments and part of opinion omitted. — ED.

Barb. 634; Haviland v. Chase, 39 Barb. 283; Taggart v. Western. Md. Railroad Company, 24 Md. 588; People v. Rensselear Insurance Company, 38 Barb. 323; Patterson v. Arnold, 45 Pa. St. R. 415.

If these views be correct, the act of incorporation is invalid, and

the defendants are not entitled to exercise corporate powers.

Judgment reversed and cause remanded, with an order to the District Court to enter judgment for the plaintiff on the findings.

Mr. Justice Temple did not participate in the foregoing decision.

BRODERIP v. SALOMON.

1895. Law Reports (1895), 2 Chancery, 323.

SALOMON v. SALOMON & CO., LIMITED.

1896. Law Reports (1897), Appeal Cases, 22.1

In 1892, Aron Salomon was carrying on business as a leather merchant, &c., and was solvent. July 28, 1892, a Limited Company was registered, under the Companies Act of 1862, for the ostensible purpose of taking over and carrying on the business then conducted by Salomon.

The Act of 1862 provides (Section 6), that "any seven or more per-1. sons, associated for a lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the provisions of the Act in respect of registration, form a company with or without limited liability." "No subscriber shall take less than one share" (Section 8). The Act prescribes no minimum value for shares. and hence the shares may be of as small a value as those who form the company may please. Nor does the Act impose any limit upon the number of shares which a single member may subscribe for. Section 30 provides that no notice of any trust shall be entered on the register. Upon the registration of the memorandum of association, and of the articles (where required), the registrar shall certify that the company is incorporated. "The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands." . . . (Section 18.)

The name of the company was Aron Salomon & Co., Limited. The nominal capital was 40,000*l*., divided into 40,000 shares, of 1*l*. each. The memorandum of association was subscribed by Salomon, his wife, his daughter, and his four sons, each subscribing for one

¹ Statement rewritten. Arguments omitted; also portions of opinions. - Ep.

share. Salomon then conveyed his business and its assets to the company for an agreed price of about 39,000l. In consideration of this conveyance, he received from the company some payments in cash, also debentures (a charge on the assets) for 10,000l., and shares for the par value of 20,000l. No other shares were ever allotted; and it was never intended that any shares should be allotted to any person except Salomon and the six members of his family. The practical result was, that Salomon owned $\frac{2000l}{2000l}$ of the allotted shares; and also held the company's debentures for 10,000l.

Subsequently, Salomon, upon the security of his aforesaid debentures, obtained from Broderip a loan of 5000*l*., which sum Salomon reloaned to the company. Thereafter, in Feb. 1893, the original debentures, which had been issued to Salomon for 10,000*l*., were returned to the company and were cancelled. In lieu thereof, with the consent of Salomon as beneficial owner, fresh debentures of the company to the same amount were issued to Broderip in order to secure the payment of his aforesaid loan of 5000*l*.

Default having been made in the payment of his interest, Broderip, in the autumn of 1893, instituted an action, on behalf of himself and all the debenture holders, to enforce his security. Thereafter a winding up order was made and a receiver appointed.

The company put in a defence and counter-claim, making Salomon a party to the counter-claim. At the time of the company's going into liquidation, 11,264l. was due to unsecured creditors whose debts had been contracted since the formation of the company. About 7733l. of this was due to trade creditors, the rest to Salomon. The liquidator has realized the assets, by arrangement without prejudice to any question on the counter-claim. He has paid Broderip's "mortgage debt on the debentures," and the rest of the proceeds will not be sufficient to satisfy what remains due on the debentures. Salomon claims whatever there may be as owner of the debentures.

The action was tried before Vaughan Williams J. [The following is an abridgment of the opinion of the learned Judge.]

There was no fraud on the shareholders, inasmuch as they were all perfectly cognizant of the conditions under which the company was formed, and as there was no intention to allot further shares at a later period to outsiders. But the company was a mere nominee of Salomon's; and the case is to be dealt with as if the nominee, instead of

¹ According to a statement in the opinion of Lord Macnaghten, it would seem that, as cash came in to the company from the business, the company went through the form of handing this cash over to Salomon, and then immediately receiving the same cash back from Salomon in exchange for the 20,000 shares allotted to him as fully paid shares. — ED.

² The charge given to the debenture-holder by the company on its property did not operate to prevent the company, while solvent, from using assets to pay current debts; but it gave the debenture-holder a preference over unsecured creditors in the event of insolvency. See 14 Law Quarterly Review, 339; Davey v. Williamson, L. R. (1898), 2 Q. B. 194. Buckley on Companies Acts, 7th edition, 186; KAY, L. J. in L. R. (1895), 2 Chan. p. 343.—ED.

being the company, had been some individual agent of Salomon's to whom he had purported to sell this business. In that case the trustee in bankruptcy of the agent would have had a right to make Salomon \ indemnify the agent against the debts that he had contracted by the direction of his principal. The right of the liquidator in the present case is precisely the same, notwithstanding the debentures which were a mere form, intended to give an appearance of reality to a sale which, in fact, was no sale at all, because it was a sale by a man to an agent for his own profit. This business was Salomon's business, and no one else's. The creditors of the company could, in my opinion, have sued Salomon. Their right to do so would depend on the circumstances of the case, whether the company was a mere alias of the founder or not. The relationship of principal and agent existed between Salomon and the company. The moment the creditors succeed in establishing the identity of Salomon with the company, the creditors of the company thereupon are shown to be the creditors of Salomon; and although it is necessary, in order to get rid of the priority given to Salomon by these debentures, that one should fall back upon the lien of the company as his agent, whom he was bound to indemnify, I do not mean to exclude from my judgment that the debentures were given to Salomon by his agent, the company, and that the necessary effect of Salomon as principal, taking these debentures from his agent, the company, was that his creditors - for, according to my view, the creditors of the company were his creditors - were defeated and delayed by the debentures.

His Lordship made the following order: -

Declare that the plaintiffs, A. Salomon & Co. Limited, or the liquidator thereof are, or is entitled to be indemnified by the defendant A. Salomon against the sum of 7733l. 8s. 3d. . . .

Order and adjudge that the plaintiffs, A. Salomon & Co. Limited, do recover against defendant A. Salomon the said sum of 77331. 8s. 3d.

Declare that plaintiffs, A. Salomon & Co. Limited, are entitled to a lien for the said sum of 7733l. 8s. 3d., upon all sums which would be payable to defendant A. Salomon out of the assets of the plaintiffs A. Salomon & Co. Limited, in respect of the debentures issued by the said company to the defendant E. Broderip in the pleadings mentioned or otherwise, and that the defendant A. Salomon is not entitled to make any claim against the assets of the plaintiffs A. Salomon & Co. Limited, until the said sum of 7733l. 8s. 3d. has been satisfied.

Aron Salomon gave notice of appeal. The company gave a counternotice of contention that [inter alia] they were entitled to have the agreement for the sale of Salomon's business and property to the company rescinded.

Buckley, Q. C. and Muir Mackenzie (McCall, Q. C. with them), for Salomon.

Farwell, Q. C. and Theobald, for the company.

LINDLEY L. J. This is an appeal by Mr. Aron Salomon against an order made by Vaughan Williams J., and which, in effect, directs Mr. A. Salomon to indemnify a limited company formed by him against the unsecured debts and liabilities incurred by or in the name of the company whilst it carried on business.

The appeal raises a question of very great importance, not only to the persons immediately affected by the decision, but also to a large number of persons who form what are called "one-man companies." Such companies were unheard of until a comparatively recent period, but have become very common of late years.

The material facts of this case are as follows: [His Lordship, after stating the facts of the case to the same effect as above, and adding that as to the 20,000 shares allotted to Aron Salomon he (Aron Salomon) contended he had paid for them though no call had ever been made; that the liquidator, on the other hand, claimed 20,000% from A. Salomon in respect of these shares; that A. Salomon had received moneys from the company, but that it did not appear whether he had paid the company for his shares, and that this was a matter which it was unnecessary to pursue further on the present occasion, proceeded as follows:—]

I proceed to examine the legal aspect of this case, which, as I have said, is one of great general importance. There can be no doubt that in this case an attempt has been made to use the machinery of the Companies Act, 1862, for a purpose for which it never was intended. The legislature contemplated the encouragement of trade by enabling a comparatively small number of persons — namely, not less than seven - to carry on business with a limited joint stock or capital, and without the risk of liability beyond the loss of such joint stock or capital. But the legislature never contemplated an extension of limited liability to sole traders or to a fewer number than seven. In truth, the legislature clearly intended to prevent anything of the kind, for s. 48 takes away the privilege conferred by the Act from those members of limited companies who allow such companies to carry on business with less than seven members; and by s. 79 the reduction of the number of members below seven is a ground for winding up the company. Although in the present case there were, and are, seven members, yet it is manifest that six of them are members simply in order to enable the seventh himself to carry on business with limited liability. object of the whole arrangement is to do the very thing which the legislature intended not to be done; and, ingenious as the scheme is. it cannot have the effect desired so long as the law remains unaltered. This was evidently the view taken by Vaughan Williams J.

The incorporation of the company cannot be disputed. (See s. 18 of the Companies Act, 1862.) Whether by any proceeding in the nature of a scire facias the Court could set aside the certificate of incorporation is a question which has never been considered, and on which I express no opinion; but, be that as it may, in such an action as this

the validity of the certificate cannot be impeached. The company must, therefore, be regarded as a corporation, but as a corporation created for an illegitimate purpose. Moreover, there having always been seven members, although six of them hold only one 11. share each, Mr. Aron Salomon cannot be reached under s. 48, to which I have already alluded. As the company must be recognized as a corporation, I feel a difficulty in saying that the company did not carry on business as a principal, and that the debts and liabilities contracted in its name are not enforceable against it in its corporate capacity. But it does not follow that the order made by Vaughan Williams J. is wrong. A person may carry on business as a principal and incur debts and liabilities as such, and yet be entitled to be indemnified against those debts and liabilities by the person for whose benefit he carries on the business. The company in this case has been regarded by Vaughan Williams J. as the agent of Aron Salomon. I should rather liken the company to a trustee for him — a trustee improperly brought into existence by him to enable him to do what the statute prohibits. It is manifest that the other members of the company have practically no interest in it, and their names have merely been used by Mr. Aron Salomon to enable him to form a company, and to use its name in order to screen himself from liability. This view of the case is quite consistent with In re George Newman & Co. 1 In a strict legal sense the business may have to be regarded as the business of the company; but if any jury were asked, Whose business was it? they would say Aron Salomon's, and they would be right, if they meant that the beneficial interest in the business was his. I do not go so far as to say that the creditors of the company could sue him. In my opinion, they can only reach him through the company. Moreover, Mr. Aron-Salomon's liability to indemnify the company in this case is, in my view, the legal consequence of the formation of the company in order to attain a result not permitted by law. The liability does not arise simply from the fact that he holds nearly all the shares in the company. A man may do that and yet be under no such liability as Mr. Aron Salomon has come under. His liability rests on the purpose for which he formed the company, on the way he formed it, and on the use which he made of it. There are many small companies which will be quite unaffected by this decision. But there may possibly be some which, like this, are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been incautious enough to trade with the company without perceiving the trap which he has laid for them.

It is idle to say that persons dealing with companies are protected by s. 43 of the Companies Act, 1862, which requires mortgages of limited companies to be registered, and entitles creditors to inspect the register. It is only when a creditor begins to fear he may not be paid that he thinks of looking at the register; and until a person is a creditor he has no right of inspection. As a matter of fact, persons do not ask to see mortgage registers before they deal with limited companies; and this is perfectly well known to every one acquainted with the actual working of the Companies Acts and the habits of business men. Mr. Aron Salomon and his advisers, who were evidently very shrewd people, were fully alive to this circumstance.

If the legislature thinks it right to extend the principle of limited liability to sole traders it will no doubt do so, with such safeguards, if any, at it may think necessary. But until the law is changed such attempts as these ought to be defeated whenever they are brought to light. They do infinite mischief; they bring into disrepute one of the most useful statutes of modern times, by perverting its legitimate use, and by making it an instrument for cheating honest creditors.

Mr. Aron Salomon's scheme is a device to defraud creditors.

Agreeing as I do in substance with Vaughan Williams J., I do not think it necessary to investigate the question whether the so-called sale of the business to the company ought to be set aside. The only object of setting it aside is to obtain assets wherewith to pay the creditors, and this object can be attained on sound legal principles by the order which he has made. In the event, however, of this case going further, I will add that I regard the so-called sale of the business to the company as a mere sham, and that in my opinion it might, if necessary, be set aside by the company in the interest of its creditors, although all the shareholders, such as they were, knew of and assented to the arrangement. They were simply assisting Mr. Aron Salomon to carry out his scheme. I cannot regard In re British Seamless Paper Box Co.¹ as an authority against a rescission of such a transaction as this.

We have carefully considered the proper form of order to be made on this appeal, and the order of the Court will be as follows: The Court, being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and, further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismiss the appeal of Aron Salomon with costs; and, it being unnecessary to make any order on the liquidators' cross-notice of appeal, discharge the order directing the liquidator to pay costs of the counter-claim, and give him those costs.

Lopes L. J. This is a case of very great importance, and I wish shortly to state my reasons for concurring in the judgment just delivered. I do not propose to restate the facts so fully and clearly

detailed by Lindley L. J.: I shall content myself with shortly stating the impression they have produced on my mind. The incorporation of the company was perfect — the machinery by which it was formed was in every respect perfect, every detail had been observed; but, notwithstanding, the business was, in truth and in fact, the business of Aron Salomon; he had the beneficial interest in it; the company was a mere nominis umbra, under cover of which he carried on his business as before, securing himself against loss by a limited liability of 11. per share, all of which shares he practically possessed, and obtaining a priority over the unsecured creditors of the company by the debentures of which he had constituted himself the holder.

It would be lamentable if a scheme like this could not be defeated. If we were to permit it to succeed, we should be authorizing a perversion of the Joint Stock Companies Acts. We should be giving vitality to that which is a myth and a fiction. The transaction is a device to apply the machinery of the Joint Stock Companies Act to a state of things never contemplated by that Act — an ingenious device to obtain the protection of that Act in a way and for objects not authorized by that Act, and in my judgment in a way inconsistent with and opposed to its policy and provisions. It never was intended that, the company to be constituted should consist of one substantial person and six mere dummies, the nominees of that person, without any real interest in the company. The Act contemplated the incorporation of seven independent bonâ fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader. To legalize such a transaction would be a scandal.

But to what relief is the liquidator entitled? In the circumstances of this case it is, in my opinion, competent for the Court to set aside the sale as being a sale from Aron Salomon to himself — a sale which had none of the incidents of a sale, was a fiction, and therefore invalid; or to declare the company to be a trustee for Aron Salomon, whom Aron Salomon, the cestui que trust, was bound to indemnify; or to declare the formation of the company, the agreement of August, 1892, and the issue of the debentures to Aron Salomon pursuant to such agreement, to be merely devices to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further, to I enable him to obtain a preference over other creditors of the company by obtaining a first charge on the assets of the company by means of such debentures. I wish to add that I am inclined to think that a scire facias would go to repeal the certificate of incorporation; but I express no decided opinion on the point. The appeal will be dismissed with costs.

[KAY L. J. delivered a concurring opinion.]

From the above decision, Salomon appealed to the House of Lords. His appeal was brought in forma pauperis. The company brought a cross appeal against the part of the order refusing rescission of the contract for the sale of Salomon's business to the company. [The decision on these appeals is reported under the name of Salomon v. Salomon & Co. Limited.]

Cohen, Q. C., Buckley, Q. C., McCall, Q. C., and Muir Mackenzie, for Aron Salomon.

Farwell, Q. C., and Theobald, for the company.

LORD HALSBURY, LORD CHANCELLOR. My Lords: The important question in this case, and I am not certain that it is not the only question, is whether the respondent company was a company at all; whether, in truth, that artificial creation of the Legislature had been validly constituted in this instance; and, in order to determine that question, it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders, or of making them shareholders, is a field of inquiry which the statute itself recognizes as legitimate. If they are shareholders they are shareholders for all purposes, and, even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the cestui que trusts of the seventh, whatever might be their rights inter se, the statute would have made them nareholders to all intents and purposes with their respective rights and liabilities; and dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body.

I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

I observe that the learned judge (Williams, J.,) held that the business was Mr. Salomon's business and no one else's, and that he chose

to employ as agent a limited company. And he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent — the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon; if it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

The learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently, the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

Williams, J. appears to me to have disposed of the argument that the company, which for this purpose he assumed to be a legal entity, was defrauded into the purchase of Aron Salomon's business, because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognizant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded.

The truth is that the learned judges have never allowed in their own mind the proposition that the company has a real existence. They have been struck by what they considered the inexpediency of permitting one man to be, in influence and authority, the whole company, and assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law, and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below, but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shown to have done, or to have intended to do, anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own.

The result is that I move your Lordships that the judgment appealed from be reversed, but as this is a pauper case I regret to say it can only be with such costs in this House as are appropriate to that condition of things, and that this appeal be dismissed with costs to the same extent.

Lord Watson.

The allegations of the company, in so far as they have any relation to the amended claim, their pith consisting in the averments made on amendment, were meant to convey a charge of fraud, and it is unfortunate that they are framed in such loose and general terms. A relevant charge of fraud ought to disclose the specific facts necessitating the inference that a fraud was perpetrated upon some person specified. Whether it was a fraud upon the company and its members, or upon persons who had dealings with the company, is not indicated, although there may be very different considerations applicable to those two cases. The res gestæ which might imply that it was the appellant. and not the company, who actually carried on its business are not set forth. Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits, without any risk beyond loss of the money which he has paid for or is liable to pay upon his shares, and the fact of his acquiring and holding debentures secured upon the assets of the company does not diminish that risk. What is meant by the assertion that the company "was the mere nominee or agent" of the appellant, I cannot gather from the record, and I am not sure that I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider.

The Lords Justices of Appeal, in disposing of the amended claim. have expressly found that the formation of the company, with limited liability, and the issue of 10,000l. worth of its debentures to the appellant, were "contrary to the true intent and meaning of the Companies Act 1862." I have had great difficulty in endeavouring to interpret that finding. I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of Lindley, L. J.) does the very thing which the Legislature intended not to be done, can yet be held to have been legally incorporated in terms of the statute. "Intention of the Legislature" is a common, but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. Accordingly, if the words "intent and meaning," as they occur in the finding of the Appeal Court, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counterclaim preferred by its liquidator must fail. In that case its creditors would not be left without a remedy, because its members, as joint traders without limitation of their liability, would be jointly and severally responsible for the debts incurred by them in the name of the company. I can conceive that there might be a limited company formed and registered by a person who had the sole interest in it, the other subscribing members being persons who were his aliases, and having no real existence; and in that case also (which does not occur here) there would be no legal company, and the real owner of the concern would be liable for its debts to the full extent of his means.

It seems doubtful whether a liquidator, as representing and in the name of the company, can sue its members for redress against a fraud which was committed by the company itself and by all its shareholders. However, I do not think it necessary to dwell upon that point, because I am not satisfied that the charge of fraud against creditors has any foundation in fact.

Lord Herschell. [After stating the facts, and reciting the previous proceedings.]

It is to be observed that both courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances, I am at loss to understand what is meant by saying that A. Salomon and Company Limited is but an alias for A. Salomon. It is not another name for the same person; the company is ex hypothesi a distinct legal persona. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled substantially to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

The Court of Appeal based their judgment on the proposition that the formation of the company, and all that followed it, was a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act 1862. The conclusion which they drew from this premiss was, that the company was a trustee and Salomon their cestui que trust. I cannot think that the conclusion follows even if the premiss be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company, and the transfer to it of the business, is that, whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference; the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable, without limit, to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think that the learned judges in the court below have contemplated the application of their judgment to such cases as I have been considering, but I can see no solid distinction between those cases and the present one.

It is said that the respondent company is a "one-man" company, and that in this respect it differs from such companies as those to which I have referred. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no

interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided in each case the requirements of the statute have been complied with, and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with a limited company; the effect of the decision is to give them the benefit as regards one of the shareholders, of unlimited liability. I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with, and this leads naturally to the inquiry what are those requirements?

The Court of Appeal has declared that the formation of the respondent company and the agreement to take over the business of the appellant, were a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please; the statute prescribes no minimum, and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The Legislature therefore clearly sanctions a scheme by which all the shares, except six, are owned by a single individual, and these six are of a value little more than nominal.

It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion it makes no difference. The statute forbids the entry in the register of any trust, and it certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum or who have agreed to become members of the company, and whose names are on the register, are alone regarded as and in fact, are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share

involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do it concerns only them and their cestui que trust if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?)

It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorizing limited liability was passed; that if what is possible under the enactments as they stand had been foreseen, a minimum sum would have been fixed as the least denomination of share permissible, and it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company, and how it is held.

Lord Macnaghten. My Lords: I cannot help thinking that the appellant, Aron Salomon, has been dealt with somewhat hardly in this case.

[The opinion then discusses the evidence as to the formation of the company.]

The company had a brief career; it fell upon evil days. Shortly after it was started there seems to have come a period of great depression in the boot and shoe trade. There were strikes of workmen too. and in view of that danger, contracts with public bodies, which were the principal source of Mr. Salomon's profit, were split up and divided between different firms. The attempts made to push the business on behalf of the new company crammed its warehouses with unsaleable stock. Mr. Salomon seems to have done what he could; both he and his wife lent the company money, and then he got his debentures cancelled and reissued to a Mr. Broderip, who advanced him 5000l, which he immediately handed over to the company on loan. The temporary relief only hastened ruin. Mr. Broderip's interest was not paid when it became due. He took proceedings at once and got a receiver appointed. Then, of course, came liquidation and a forced sale of the company's assets. They realized enough to pay Mr. Broderip, but not enough to pay the debentures in full, and the unsecured creditors were consequently left out in the cold.

The order of the learned judge appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who

are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lords Justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed, the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactments, "of exercising all the functions of an incorporated company." Those are strong The company attains maturity on its birth. There is no period of minority; no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Among the principal reasons which induce persons to form private companies as is stated very clearly by Mr. Palmer in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law. A company too can raise money on debentures, which an ordinary trader cannot do; any member of a company acting in good faith is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take.

If, however, the declaration of the Court of Appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say that I can find nothing in the evidence to support such an imputation. The purpose

for which Mr. Salomon and the other subscribers to the memorandum were associated was "lawful." The fact that Mr. Salomon raised 5000l. for the company on debentures that belonged to him seems to me strong evidence of his good faith and of his confidence in the company. The unsecured creditors of A. Salomon and Co. Limited may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon and he had always paid his way; but they had full notice that they were no longer dealing with an individual, and they must be taken to have been cognisant of the memorandum and of the articles of association.

It has become the fashion to call companies of this class "one-man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading; if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

Lord Morris. My Lords: I quite concur in the judgment which has been announced, and in the reasons which have been so fully given for it.

Lord Davey. My Lords: It is possible, and (I think) probable, that the conclusion to which I feel constrained to come in this case may not have been contemplated by the Legislature, and may be due to some defect in the machinery of the Act. But, after all, the intention of the Legislature must be collected from the language of its enactments; and I do not see my way to holding that if there are seven registered members, the association is not a company formed in compliance with the provisions of the Act, and capable of carrying on business with limited liability either because the bulk of the shares are held by some only, or even one of the members, and the others are what is called "dummies," holding, it may be, only one share of 1l. each; or because there are less than seven persons who are beneficially entitled to the shares.

I think that this result follows from the absence of any provision fixing a minimum nominal amount of a share, the provision in sect. 8, that no subscriber shall take less than one share, and the provision in sect. 30, that no notice of any trust shall be entered on the register.

With regard to the latter provision, it would, in my opinion, be impossible to work the machinery of the Act on any other principle, and to attempt to do so would lead only to confusion and uncertainty. The learned counsel for the respondents (wisely, as I think), did not lay any stress on the members, other than the appellant, being trustees for him of their shares. Their argument was that they were "dummies," and did not hold a substantial interest in the company—i. e., what a jury would say is a substantial interest. In the language of some of the judges in the court below, any jury, if asked the question, would say the business was Aron Salomon's, and no one else's.

It was not argued in this case that there was no association of seven persons to be registered, and that the registration therefore operated nothing, or that the so-called company was a sham and might be disregarded. And, indeed, it would have been difficult for the learned counsel for the respondents appearing, as they did, at your Lordships' bar for the company who had been permitted to litigate in the courts below as actors on their counter-claim, to contend that their clients were non-existent. I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that sect. 18, making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it.

We start, then, with the assumption that the respondents have a corporate existence with power to sue and be sued, to incur debts and be wound-up, and to act as agents or as trustees, and I suppose, therefore, to hold property.

I am at a loss to see how in either view taken in the courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant, and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking the learned counsel what the equity was, but got no answer. By an alias is usually understood a second name for one individual, but here, as one of your Lordships has already observed, we have, ex hypothesi, a duly formed legal persona, with corporate attributes, and capable of incurring legal liabilities. Nor do I think it legitimate to inquire whether the interest of any member is substantial when the Act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the Court of Appeal, the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanor (which I do not think he has), he may be proceeded against civilly or criminally; but how either of these states of circumstances creates the relation of cestui que trust and trustee, or principal and agent, between the appellant and respondents, is not apparent to my understanding.

I am, therefore, of opinion that the order appealed from cannot be

supported on the grounds stated by the learned judges.

But Mr. Farwell also relied on the alternative relief claimed by his pleadings, which was quite open to him here, viz., that the contract for purchase of the appellant's business ought to be set aside for fraud. The fraud seems to consist in the alleged exorbitance of the price, and the fact that there was no independent board of directors with whom the appellant could contract. I am of opinion that the fraud was not made out. I do not think the price of the appellant's business (which seems to have been a genuine one, and for some time a prosperous business) was so excessive as to afford grounds for rescission, and as regards the cash portion of the price it must be observed that as the appellant held the bulk of the shares, or (the respondents say) was the only shareholder, the money required for the payment of it came from himself in the form either of calls on his shares or profits which would otherwise be divisible. Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members. In fact, it was impossible to say who was defrauded.

In the original appeal, order appealed from reversed.

In the cross appeal, order appealed from affirmed.

CHAPTER IV.

CORPORATIONS DE FACTO.

FINNEGAN v. NOERENBERG.

1893. 52 Minnesota, 239.1

GILFILLAN, C. J. Eight persons signed, acknowledged, and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, ch. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the 'Knights of Labor.'" The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction, amounting to \$599.50, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because — First, the act under which it attempted to become incorporated, to wit, Laws 1870, ch. 29, is void, because its subject is not properly expressed in the title; second, the act does not authorize the formation of corporations for the purpose or to transact the business stated in the articles; third, the place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a de jure corporation, so that it could defend against a quo warranto, or an action in the

¹ Statement and arguments omitted. - ED.

nature of quo warranto, in behalf of the state; for, although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation de facto, — that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a de facto corporation is stated by Selden, J., in Methodist, etc., Church v. Pickett, 19 N. Y. 482, as "(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law." This statement was apparently adopted by this court in East Norway Church v. Froislie, 37 Minn. 447, (35 N. W. Rep. 260;) but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations (page 145) is more nearly accurate: "When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally."

To give a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a de facto corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in Johnson v. Corser, 34 Minn. 355, (25 N. W. Rep. 799,) in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a de facto corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required.

"Color of apparent organization under some charter or enabling act" does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation de jure. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto.

[The Court then held, that the subject of the act was properly expressed in the title, and that the statute authorized the formation of corporations for the purposes stated in the articles signed by these

defendants. The opinion then proceeds as follows:] The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a de jure corporation, would not prevent it becoming one de facto.

The foundation for a de facto corporation having been laid by the

attempt to organize under the law, the user shown was sufficient.

Judgment [for defendants] affirmed.

JONES v. ASPEN HARDWARE CO.

1895. 21 Colorado, 263.1

Error to the District Court of Pitkin County.

The Aspen Hardware Company instituted this suit in the court below for the purpose of recovering a stock of goods seized by the United States marshal under a writ of attachment issued out of the circuit court of the United States at the suit of Joseph A. Thatcher, plaintiff, against one A. B. Eads. The only question in the case has reference to the corporate capacity of defendant in error, it not having filed, prior to the attachment levy, its certificate of incorporation with the secretary of state, as required by statute. Session Laws of 1887, p. 406. In the district court judgment was entered in favor of the company. The statute reads as follows:

"Every corporation . . . incorporated by or under any general or special law of this state, . . . shall pay to the secretary of state for the use of the state, a fee [proportioned to the amount of capital stock]. . . The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association, or charter of said corporation, . . . in the office of the secretary of state; and no such corporation . . . shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, . . . until said fee shall have been paid to him. . . ."

In 1889, Bowles, Eads, and Kettler formed an organization known as the Aspen Hardware Company. They intended that the company should be legally incorporated. To this end they caused to be executed articles of incorporation, on Nov. 16, 1889, in due form; and immediately filed the same with the clerk and recorder of Pitkin County. For some reason not explained by the evidence, the articles were not filed in the office of the secretary of state until after the levy of the writ of attachment hereinafter referred to, and not until the day upon which this suit in replevin was instituted, but whether

¹ Statement abridged. Part of opinion omitted. - ED.

before or after the commencement of this action does not clearly appear from the evidence.

After the articles were filed with the county clerk, the directors therein named, of whom Eads was one, held a meeting, elected officers, caused capital stock to be issued, &c. Eads, thereupon, for a valuable consideration, sold and transferred to the new organization the stock in trade of a hardware business; and Bowles from that time conducted the business for the Aspen Hardware Company, selling goods and purchasing new goods in the corporate name.

The business was thus continued until July 31, 1890, when a suit was commenced by Thatcher against Eads, and the property in question levied upon as the property of the defendant in that suit; and this action of replevin was immediately instituted to recover possession of the property, or its value.

A. B. McKinley, Hugh Butler, and Wilson & Salmon, for plaintiff in error.

H. W. Clark, and W. W. Cooley, for defendant in error.

HAYT, C. J. . . . The controversy in this case is narrowed to the single question of the capacity of defendant in error to take title to the property in controversy as a corporation at the time of the attempted transfer by Eads, it not having at that time filed its articles of incorporation with the secretary of state, or paid the fee for such filing, as provided by the statute of 1887. Session Laws of 1887, p. 406.

The language of the act is plain and unambiguous. It reads, "no such corporation . . . shall have or exercise any corporate powers. . . ." The taking of title to property was certainly the exercise of a corporate power, and as such prohibited by the express terms of the statute. This is not controverted by counsel for appellee, but it is contended that Eads having assisted in the organization of the corporation, and having sold to it the hardware stock, is estopped from denying the corporate existence of the company, and that the attaching creditor took the property subject to the same estoppel.

The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a de facto existence. The rule is stated as follows by Morawetz on Private Corporations, sec. 750, it having been first announced in the case of Brouwer v. Appleby, 1 Sandf. 158: "A defendant who has contracted with a corporation de facto is never permitted to allege any defect in its organization as affecting its capacity to contract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the state."

It is also well settled that to constitute a de facto corporation there must be either a charter or a law authorizing the creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user or attempt to exercise corporate powers under it. Duggan v. The Colo. Mort. & Inv. Co., 11 Colo. 113; Bates et al. v. Wilson et al., 14 Colo. 140.

(A de facto corporation can never be recognized in violation of a positive law.) This principle, which seems to be supported by all the authorities, is thus stated by Morawetz on Private Corporations, sec. 758: "If the formation of a corporate association is not only prohibited by this general rule of the common law, but is also in violation of some principle of morality or public policy, or a positive statutory prohibition, the parties forming such association will not be legally bound by their agreement of membership, and the courts will not recognize the association, either as among its members or against third parties." To recognize the defendant as a de facto corporation, would, as we have seen, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power.

One object of this statute is to restrict the organization of "wildcat" corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the overcapitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from

the plain language of the act.

The taking of title to the property in controvery being the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of The Aspen Hardware Company as a corporation cannot be upheld. Having failed to comply with the statute, The Aspen Hardware Company at the time of the transfer was neither a de jure nor a de facto corporation, but simply a voluntary association of individuals in the nature of a copartnership.

There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not

made prerequisites to the exercise of such powers.

"In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter." Abbott v. Omaha Smelting & Refining Company, 4 Neb. The omission in this case is of acts of the former class, and consequently there was no corporation in esse at the time of the levy of the writ, while the evidence leaves it in doubt if this omission had been supplied prior to the institution of the present action.

But although it could not at the time exercise any corporate power, this did not prevent The Aspen Hardware Company from taking title to the property as a copartnership. In other words, under the conceded facts, the company was not at the time a corporation, but this will not preclude it from maintaining the action as a copartnership. The plaintiff sues as The Aspen Hardware Company, and the facts alleged show that such company was a copartnership and not a corporation. There is nothing in the name of the association to conflict with this, as at common law partners may carry on business under any name they choose. They are bound rather by their acts than by the style which they give to themselves. Cook on Stock and Stockholders, sec. 233; Chaffee v. Ludeling, 27 La. Ann. 607.

This principle has been applied in many cases where parties have set up the defense of individual nonliability by reason of having directed an incorporation to be had, but where none in fact was consummated. Cook on Stock and Stockholders, sees. 233, 234; Abbott v. Omaha Smelting & Refining Co., supra; Empire Mills v. Alston Grocery Co., 15 S. W. Rep. 505 (Texas).

The law having cast this liability upon the members of the assocition, we think they must be given the advantages accorded a copartnership. So, in this case, while we feel compelled under the statute to deny plaintiff's right of recovery as a corporation, we think they may maintain the action as a copartnership. The cause will accordingly be reversed and remanded, with directions to the district court to allow the parties to amend their pleadings as they may be advised.

Reversed.

GARVER, J. IN McLENNAN v. HOPKINS.

1895. 2 Kansas Court of Appeals, 260, pp. 265-268.1

GARVER J. . . .

The question still remains, was the Bank of Dorrance a corporation de facto? We think not. It is difficult, and perhaps unnecessary, to attempt to reconcile the many decisions bearing on this question. Between some of them there is an irreconcilable conflict, so that, when we come to determine what is a de facto corporation, we are met by a diversity of authority. The rule recognized by the Supreme Court of this state is thus stated by Mr. Justice Brewer in Pape v. Capital Bank, 20 Kan. 440: "When parties have associated themselves together for the purpose of organizing a corporation under a general law, and have proceeded in good faith to take all the steps supposed necessary to complete such incorporation, and on the faith thereof engage in business as a corporation for a series of years, a party who has repeatedly dealt with them as such corporation will not, when sued on a note and mortgage held by it, be permitted to show, as a defense to the action, that there was some mere technical omission in the steps prescribed for incorporation. The corporation is one de facto; and only the state can then inquire - and that in a direct pro-

 $^{^1}$ The extracts from the opinion are reprinted from 41 Pacific Reporter, pp. 1062, 1063. \leftarrow Ep.

ceeding — whether it be one de jure. . . . There must in such cases be a law under which the incorporation can be had. There must also be an attempt in good faith on the part of the incorporators to incorporate under such law. And when, after this, there has been for a series of years an actual, open, and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuser after the incorporation, are subjects of inquiry in such an action." The attempt to incorporate, referred to in that case, must be something more than the mere physical organization, or formal arrangement into a working force, of the promoters of the enterprise. Something must be done beyond the mere transaction of business in the manner and form usually adopted by corporations. There must also be something more tangible and effective than a mere mental operation in the direction of what is intended. The steps taken and the attempt made must, to some extent and in some degree, have resulted in the effecting of those things which the law designates as a prerequisite to a corporate existence, however informal and irregular such proceedings and results may be. Had the articles of incorporation been prepared and recorded or filed as required by the statute, and the organization had been otherwise effected as shown in this case, no question could be thus raised as to the fact of a corporate existence because of defects and irregularities in the attempted organization, or in the articles of incorporation. But, an entire failure on the part of the officers of the bank to prepare and execute the certificate or articles of incorporation required by law, and an entire failure to file a certificate or statement of any kind whatever in the office of the register of deeds of the county, or in the office of the secretary of state, left the organizers of this bank without a shadow of legal corporate existence. There was no substantial compliance with the law, and there could be no de facto corporation. We are supported in this conclusion by the following cases: Bigelow v. Gregory, 73 Ill. 197; Kaiser v. Bank, 56 Iowa, 104, 8 N. W. 772; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Hill v. Beach, 12 N. J. Eq. 31; Stout v. Zulick, 48 N. J. Law, 599, 7 Atl. 362; Abbott v. Smelting Cy., 4 Neb. 416; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357; Railroad Co. v. Cary, 26 N. Y. 77; Hurt v. Salisbury, 55 Mo. 310; Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246; Whipple v. Parker, 29 Mich. 369. In the cases cited, there was a failure on the part of the organizers of the claimed corporation to do some act, generally the neglect to file the articles of association or incorporation, made by the statute a prerequisite to corporate existence; and the rule clearly and forcibly laid down is that in such case / there is no de facto corporation, and that the claimed corporate exist/ ence may be attacked collaterally. An exception to this rule exists

in cases where one is sued by the alleged corporation upon a contract in which the corporate capacity is recognized. To this effect are Jones v. Foundry Co., 14 Ind. 89; Meikel v. Fund Soc., 16 Ind. 181; Irrigation Co. v. Warner, 72 Cal. 379, 14 Pac. 37; Massey v. Building Ass'n, 22 Kan. 379. In those cases another principle is invoked, which does not permit a party to avoid the obligation of his contracts upon the mere technical objection that the party with whom he contracted had not the legal capacity to enter into the contract of which he has had the benefit. The distinction between that class of cases and the case under consideration is obvious. It is equally well set tled that a substantial, though imperfect and irregular, compliance with the law, in a bona fide attempt to incorporate, followed by a user of corporate rights, will create a de facto corporation, and the corporate existence cannot be collaterally questioned by one dealing with it as a corporation. To this effect are Baker v. Neff, 73 Ind. 68; Williamson v. Ass'n, 89 Ind. 389; Rice v. Railroad Co., 21 Ill. 93; Railroad Co. v. Cary, 26 N. Y. 75; Mining Co. v. Woodbury, 14 Cal. 424; Oroville, etc., R. Co. v. Plumas Co., 37 Cal. 361; Swartwout v. Railroad Co., 24 Mich. 389.

We think the facts shown by the record justified the trial court in holding the plaintiffs in error liable as partners for the debts of the bank.

DAVIS v. STEVENS.

1900. 104 Federal Reporter, 235.1

In the U.S. District Court for the District of South Dakota.

On March 21, 1900, creditors of the Bank of Plankinton filed a petition, praying that the Bank of Plankinton be adjudged bankrupt, as a private banking institution, and a co-partnership consisting of the above-named defendants. In their answer defendants deny generally the allegations of the petition, and, further answering, allege that the Bank of Plankinton was during the times alleged in the petition, and now is, a corporation duly organized under the laws of the territory of Dakota and the state of South Dakota. It appears from the testimony and admission of the parties to this proceeding that on the 27th day of November, 1885, articles of incorporation, duly signed and acknowledged by Edwin S. Rowley, Fred L. Stevens, Charles A. Johnson, Joseph D. McCormick, and William M. Smith, were duly filed in the office of the secretary of the territory of Dakota, wherein it was stated that the business of the proposed corporation, which was to be

 $^{^{1}}$ Statement abridged. Only so much of the opinion is given as relates to a single point. — Ep.

called the Bank of Plankinton, should be a general banking, real estate, and loan business. Upon the filing of said articles there was issued by the secretary of the territory of Dakota a certificate of corporate existence to the parties above named, wherein it was certified that said parties, their associates and successors, had become a body politic and corporate under the corporate name of Bank of Plankinton. . . . It further appears that the Bank of Plankinton did business as a banking corporation from the time of its alleged incorporation until about Jan. 10, 1900, when it closed its doors and ceased to do business.

CARLAND, District Judge. [After stating the case.] It is claimed by the petitioners that, as there was no law of the territory of Dakota which authorized the incorporation of individuals to do a banking business, the defendants in this proceeding, who are alleged to have owned stock in this corporation, were simply partners, and as such were doing business as a private bank, and thus subject to be adjudicated a bankrupt as a private bank. It is contended by the defendants that whether or not the Bank of Plankinton was a corporation cannot be inquired into collaterally, and that the state of South Dakota is the only power which could, by proceedings in the nature of a quo warranto, inquire into the legal organization of this corporation. If the Bank of Plankinton was a de facto corporation, this position would be unassailable. But, in order that there may be a de facto cor, poration, it must have been possible for the territory of Dakota to have chartered a de jure corporation, and as there was no law of the territory of Dakota permitting the incorporation of banking corporations at the time the Bank of Plankinton received its certificate of corporate existence, it results that there cannot be a de facto corporation. limitation of the doctrine that the validity of corporate existence cannot be litigated collaterally is that, where there is no law under which a corporation might exist, then the validity of corporate existence may be attacked collaterally. Heaston v. Railroad Co., 16 Ind. 275; Krutz v. Town Co., 20 Kan. 397; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; 1 Thomp. Corp. § 505. As is said in section 502, 1 Thomp. Corp.:

"We must not get too far away from the primal proposition that the legislature alone can create a corporation, and that a collection of individuals cannot make themselves a corporation by merely resolving to be such, or calling themselves such. The three tailors of Tooley street did not make themselves the people of England by passing a resolution in which they styled themselves such. There must be some basis for the operation of the rule, and accordingly we find a better statement of it in the proposition that where a corporation exists de facto, and in fact exercises corporate powers, the question whether it exercises such powers lawfully cannot be litigated in a collateral proceeding between private parties, or between a private party and the corporation. The question can only be litigated between the corporation and the state."

Defendants invoke section 2892 of the Compiled Laws of Dakota, which is in the following language:

"The due incorporation of any company claiming in good faith to be a corporation under this chapter and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party, but such inquiry may be had and action brought at the suit of the territory in the manner prescribed in the Code of Civil Procedure."

This section, as I understand it, simply declares the law in the same manner that the courts declare it. It presupposes that there is a de facto corporation, which cannot exist if there could have existed no de jure corporation. In the case of Oroville & V. R. Co. v. Supervisors of Plumas Co., 37 Cal. 354, it was held by the Supreme Court of California that a similar provision in the laws of that state did not go to the extent of precluding private persons from denying the existence de jure or de facto of the alleged corporation.

As the claims of the creditors who are petitioners in this action arise from simply depositing money with the Bank of Plankinton, there is no such relation between the bank and the creditors as would allow the principle of estoppel to be urged. I, therefore, am of the opinion that the parties interested in the Bank of Plankinton were copartners.

[Petition dismissed for other reasons.]1

1889. 148 Mass. 249.

CONTRACT, to recover the price of goods sold and delivered.

At the trial in the Superior Court, before Dewey, J., the only question was whether the goods were sold to a corporation called the Forbes Woolen Mills, or to the defendant as doing business under that name. The plaintiffs introduced evidence tending to show that subsequently to May, 1885, they received an order for the goods by a letter, written upon paper with the printed heading, "Incorporated 1885. Forbes

1 If the statute which purports to authorize incorporation, and under which there has been a bona fide attempt to organize, is subsequently held to be unconstitutional, does this prevent the organization from occupying the position of a de facto corporation?

For an affirmative answer, see Eaton v. Walker, 76 Michigan, 579 (and compare Branden-

stein v. Hoke, 101 California, 131; the case of a Levee District).

For cases holding that shareholders and persons contracting with such an organization are precluded from denying its corporate existence, see Winget v. Quincy, &c. Association, 128 Illinois, 67, p. 84; Building, &c. Association v. Chamberlain, 4 South Dakota, 271; Richards v. Minnesota Savings Bank, 75 Minn. 196, pp. 205-206, ; Gardner v. Minneapolis, &c. R. Co. 73 Minn. 517, pp. 526-528. - ED.

Woolen Mills. George E. Forbes, Treasurer," and signed, "Forbes Woolen Mills by Geo. E. Forbes, Treasurer"; that they thereupon shipped the goods to the Forbes Woolen Mills and received in payment therefor three promissory notes, together equal to the price of the goods, signed "Forbes Woolen Mills by Geo. E. Forbes, Treasurer"; that when they sold the goods and took the notes, they understood from their correspondence with the defendant, as well as from information gained from a commercial agency, that the Forbes Woolen Mills were a corporation, and made all charges on their books against them as a corporation; and took the notes from the defendant as the notes of a corporation; and that after they sold the goods and received the notes they became satisfied there was no such corporation as the Forbes Woolen Mills; and contended that they were entitled to recover the price of the goods from the defendant personally.

The defendant contended that the Forbes Woolen Mills was a corporation, and testified that he purchased the goods as treasurer of the Forbes Woolen Mills, but admitted that they had not been paid for except by the notes, which themselves had not been paid; that in May, 1885, for the purpose of limiting his personal responsibility, and because the tax laws of New Hampshire were more favorable to corporations than the Massachusetts laws, he went to Nashua, New Hampshire, to form a corporation for the manufacture of woollen goods; that he employed an attorney at law of Nashua to incorporate the company in a legal and proper manner, under the laws of that State, and subsequently paid him for his services and disbursements in the premises; that he went to Nashua again, and with the attorney and three other persons, selected and secured by the attorney, signed and executed an agreement of association, which was dated May 6, 1885, and was duly recorded in the office of the Secretary of State of New Hampshire on May 12, 1885, and in the office of the clerk of the city of Nashua on May 13, 1885, and recited that the subscribers associated themselves for the purpose of forming a corporation, to be called the Forbes Woolen Mills, the amount of the capital stock to be twenty thousand dollars, divided into four hundred shares of fifty dollars each; and that the object of the corporation was to manufacture and sell woollen and other goods, and the places of business were Nashua in New Hampshire, and East Brookfield in Massachusetts.

The defendant further testified that, subsequently to the execution of the agreement of association, one or more meetings were held by the signers, at which he was elected president and treasurer of the corporation, and such other officers and directors were elected as were necessary under the laws of New Hampshire; that the attorney had been recommended to him as a reputable and reliable man and attorney, and he left everything in his hands, and supposed he did everything necessary and proper to establish the corporation in a legal manner; that records of the meetings were kept by the attorney, and that there was a stock-book and certificates of stock were issued; that all the

stock was issued to the defendant, and that no other person was interested in it; that fifty per cent of the capital stock of the corporation was actually paid in by him in cash and supplies; that after the organization of the corporation he hired, as treasurer of the corporation, a mill in East Brookfield belonging to his mother, Roxanna Forbes, and himself, and began the manufacture of woollen goods; that he purchased the necessary supplies, including those named in the plaintiff's account, and placed them under the direction of a superintendent, employed to supervise the manufacture of the goods; that there was no manufacturing done in Nashua, nor any other business except the holding of corporate meetings, and possibly the sale now and then of a bill of goods in the ordinary course of business; and that the principal place of business of the corporation was in East Brookfield; that he, as president and treasurer of the corporation, continued to manufacture woollen goods for about four months, and sent the goods to commission houses in New York to be sold; and that at the end of said four months he was unable to continue the business and gave it up, and no further business was done by him or by the corporation.

The following sections of chapter 152 of the General Laws of New Hampshire of 1878, were introduced in evidence:

"Sect. 1. Any five or more persons of lawful age may, by written articles of agreement, associate together, for agricultural, educational, or charitable purposes, or for carrying on any lawful business, except banking and the construction and maintenance of a railroad; and when such articles have been executed and recorded in the office of the clerk of the town in which the principal business is to be carried on, and in that of the Secretary of State, they shall be a corporation, and such corporation, its officers and stockholders, shall have all the rights and powers, and be subject to all the duties and liabilities of similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter.

"Sect. 2. The object for which the corporation is established, the place in which its business is to be carried on, and the amount of capital stock to be paid in, shall be distinctly set forth in its articles of agreement."

Upon this evidence, the defendant asked the judge to rule that the plaintiffs were not entitled to recover, that the account in question had been paid by the notes of the Forbes Woolen Mills as a corporation, and that there was no evidence to authorize the jury to find for the plaintiffs.

The judge declined so to rule, and submitted the following questions to the jury: "1st. Did the Forbes Woolen Mills and the members of said alleged corporation, including said Forbes, at the time of its attempted organization, intend to carry on its business as a manufacturing corporation (other than holding meetings of its members and officers) in whole or in part in the city of Nashua, New Hampshire? 2d. Was there an attempt in good faith on the part of the defendant,

Forbes, to organize the corporation of the Forbes Woolen Mills? 3d. Did said Forbes, at and prior to the time the goods in controversy were ordered, namely, at all times after May 12, 1885, during his dealings with the plaintiff, believe that the organization of said Forbes Woolen Mills was a valid corporation?"

The jury answered the first two questions in the negative, and the third in the affirmative.

The judge, being of the opinion that, upon the findings of the jury and the uncontradicted evidence in the case, the plaintiffs were entitled to recover, directed the jury to return a verdict for the plaintiffs, and reported the case for the determination of this court.

W. B. Harding & H. F. Harris, for the plaintiffs.

B. W. Potter & M. M. Taylor, for the defendant.

C. Allen, J. The apparent corporation was not a corporation. The statute of New Hampshire requires five associates, and the articles of agreement must be recorded in the town in which the principal business is to be carried on, and the place in which the business is to be carried on must be distinctly stated in the articles; otherwise there is no corporation. The defendant's pretended associates were associates only in name; he alone was interested in the enterprise. articles of agreement were recorded in Nashua, and stated that the business was to be carried on there; but it was not in fact carried on there, and was not intended to be. The defendant took all the shares of the capital stock, and paid in to himself as treasurer only fifty per cent of the amount thereof. This is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. It was just the same as if the defendant had done nothing at all in the way of establishing a corporation, but had conducted his business under the name of the Forbes Woolen Mills, calling it a corporation. The business was his personal business, which he transacted under that name. Fuller v. Hooper, 3 Gray, 334, 341. Bryant v. Eastman, 7 Cush. 111.

The jury found that he did not in good faith attempt to organize the corporation, but that he believed it to be a valid corporation. His belief, in view of the facts of the case, is immaterial. Under this state of things, the defendant bought goods of the plaintiffs for his own sole benefit, adopting the name of the apparent corporation, which had no real existence, and which represented nobody but himself. He cannot escape responsibility for his purchases by the device of putting such a mere name between himself and the plaintiffs. The purchase was in substance by and for himself alone. The plaintiffs might have repudiated the transaction, and maintained replevin, if they had learned the facts in time. They may also treat the transaction as a sale to the defendant personally. Fay v. Noble, 7 Cush. 188, 194. Kelner v. Baxter, L. R. 2 C. P. 174, 183, 185. 2 Kent Com. (13th ed.) 630.

Since the notes represented nothing, the plaintiffs were at liberty to

treat them as void, and recover on the original contract for goods sold. Melledge v. Boston Iron Co. 5 Cush. 158, 171.

Verdict to stand.

INDIANAPOLIS FURNACE CO. v. HERKIMER.

1873. 46 Indiana, 142.1

From the Marion Circuit Court.

Hendricks, Hord & Hendricks and Test, Burns & Wright, for appellant.

J. E. McDonald and J. M. Butler, for appellee.

WORDEN, J. Complaint by the appellant against the appellee on the following paper subscribed by the defendant.

- "Articles of association of the Indianapolis Furnace and Mining Company, organized for the purpose of operating in the counties of Marion and Clay, in the State of Indiana.
- "Article First. The name of said company shall be the Indianapolis Furnace and Mining Company.
- "Article Second. The capital stock of said company shall be one hundred thousand dollars, and be divided into shares of fifty dollars each, to be paid for in such amounts and at such times as may be ordered by the board of directors.
- "Article Third. The stockholders shall elect directors, who shall from their number elect a president, secretary, and treasurer, who shall hold their office for one year and until their successors are elected and qualified.
- "Article Fourth. The board of directors shall have the control and management of the business of the company, except as they may appoint some one or more persons to take charge of the same, in which case the record of the action of the board in appointing them shall be evidence of their authority to act for said company.
- "Article Fifth. The board of directors shall have power to make assessments on stock, collect the same, issue certificates therefor, and declare and pay dividends, which shall be at least twice a year.
- "Article Sixth. All the expense incurred by the company shall be paid, and all the indebtedness of the same shall likewise be discharged before any dividends shall be paid to the stockholders, unless the directors shall direct otherwise.
- "Article Seventh. We, the undersigned, hereby subscribe to all the foregoing articles, provisions, conditions, and stipulations, and agree to the organization of a company as therein stated, binding ourselves to take and pay for the number of shares of stock set opposite our names respectively, and pay for the same at such times and in such

¹ Only part of the opinion is given. - ED.

amounts as the board of directors may order the same to be paid for, without relief from valuation or appraisement laws.

"Subscribers' Names.

No. of Shares.

"J. D. Herkimer, by D. Root,

100."

There were three paragraphs in the complaint, each counting upon the same instrument, in each of which it was alleged that at the time of the execution of the instrument by the defendant, the plaintiff was a duly organized corporation; but it is not alleged in either paragraph that after the execution of the instrument any steps were taken to perfect the organization.

The defendant demurred to each paragraph, assigning for cause the want of a statement of sufficient facts, but the demurrers were overruled, and the defendant excepted.

The defendant then answered,

- 1. By general denial.
- 2. Nul tiel corporation.
- 3. Nul tiel corporation, setting out specially the omission of the performance of the acts required by the statute, in order to perfect the corporate organization.
 - 4. A denial of the execution of the instrument, sworn to.

Trial by the court, finding and judgment for the defendant, the plaintiff having unsuccessfully moved for a new trial.

We may properly here notice another proposition, which, though not perhaps directly involved, is in some measure connected with the motion for a new trial. We are of opinion that a radical error was committed in overruling the demurrers to the several paragraphs of the complaint. The articles of association signed by the defendant, including his subscription for stock, were very clearly mere preliminary articles, contemplating a future perfection of the organization as a corporation. The defendant's contract did not purport to be with an existing corporation, but with one to be brought into existence in the future. The averment in the complaint that the plaintiff was, at the time the subscription was made, an existing corporation, cannot change the nature and legal effect of the defendant's contract. That contract was, in legal effect, that the defendant would take and pay for the stock subscribed for, in case the organization should be perfected and the corporation brought into legal existence, and not otherwise. Such preliminary subscriptions seem to enure to the benefit of the corporation when formed. Heaston v. The Cincinnati, etc., Railroad Co., supra.

But unless the subsequent steps, necessary to bring into existence the corporation, were taken, there was no corporation to whose benefit the contract could enure, and the defendant could not be liable; and it should have been averred in the complaint that such steps had been taken. Wert v. The Crawfordsville and Alamo Turnpike Co., 19

Ind. 242; Williams v. The Franklin Township Academical Association, 26 Ind. 310.

In such case, the estoppel growing out of a contract with a party as an existing corporation does not apply. In the case last cited, the

court say:

"This rule of estoppel does not apply to a suit brought on a subscription made with a view to the organization of a corporation, and as preliminary thereto, where other acts are required by the law as a condition precedent to the exercise of corporate powers."

[The court then held, that, under the statute, it was an indispensable prerequisite to the legal existence of the corporation that a certificate should be filed in the office of the Secretary of State, which was not

done in the present case.]

Now, although the complaint was held good, the pleas of *nul tiel corporation* put in issue the existence of the corporation; and we think, under the issues, the plaintiff was bound to prove such existence by showing a compliance with the statutory requisites. The burthen was on the plaintiff, because the defendant was not estopped by his contract to dispute the existence of the corporation, and because the perfection of the organization was a condition precedent to the plaintiff's right to recover.

We now proceed to consider the ground, upon which it is claimed that a new trial should have been granted. There were six reasons assigned for a new trial. [One reason was, the refusal of the court to hear the testimony of Horace W. Hibbard, to the effect that the defendant told him that he had five thousand dollars of the stock of said company, and offered to trade the same to him. As to this Worden, J., said]: The evidence of Hibbard was properly rejected, because such recognition by the defendant of the existence of the corporation could not estop him to controvert the fact; nor could it supply the omission of an act which the law requires to be performed before the corporation can be called into being.

Judgment below affirmed.

1874. ON PETITION FOR A REHEARING.

Worden, C. J. The appellant has filed a petition for a rehearing in this case, claiming, as we understand the argument, that as it was shown by averment and proof, that the defendant's contract was made with an existing corporation, it should be treated as such; and therefore it was unnecessary for the plaintiff to show that the proper steps had been taken to perfect the organization of the corporation.

In the original opinion, we set out in full the contract entered into by the defendant. That contract very clearly was not with an existing corporation. It contemplated a future organization of the corporation, to which he was to become liable on his subscription. To treat him as having promised to pay the amount of his subscription to a corporation

which then existed, would be to make a new contract for him in place of the one which he made for himself. There may have been a corporation of the same name, and organized for the same purpose, in existence at the time the defendant made his contract; but if so, the contract set out was not made with such existing corporation. That contract was to pay a corporation to be thereafter organized and brought into existence. (The ground upon which a party who has contracted with a corportion as such is estopped to deny its existence, is, that by his contract he has recognized the existence of the corporation.)

The contract in question, instead of purporting to be made with an existing corporation, utterly excludes the idea of its present existence, but contemplates the future organization of the corporation, to which he was to pay the amount of his subscription.

The legal effect of a written contract cannot be thus changed by averment or parol evidence.

The petition for a rehearing is overruled.

JOHNSON v. CORSER ET ALS.

1885. 34 Minnesota, 355.

On April 30, 1884, the defendants signed articles associating themselves together for the purpose of organizing as a body corporate under the name of "The Sixth Avenue North Extension and Improvement Association." These articles of association were not filed for record until November 21, 1884. In the first week in May, 1884, bylaws were adopted and officers were elected. On June 16, 1884, a contract in writing, in the name of the association, was made with Egan & Salter for grading and improving Sixth Avenue. Work was begun under this contract, and continued till August 5, 1884, when the plaintiff and others, laborers engaged upon the work, struck and refused to continue work, because they had not received their pay. Two of the defendants, the secretary and vice-president of the association, visited the scene of work and succeeded in inducing plaintiff and his fellow-laborers to return to work, upon the promise, as claimed by plaintiff but denied by defendants, that the association would pay them. Thereafter the plaintiff continued work till November 18, 1884, and the officers of the association paid them to October 1, 1884.

The plaintiff brought this action before a justice of the peace for Hennepin county against the defendants, as partners, to recover for his work and services from October 1, 1884, to November 18, 1884. Upon appeal to the district court, the action was tried before *Young*, J., and a jury, and plaintiff had a verdict. Defendants appeal from an order refusing a new trial.

Rea, Kitchel & Shaw, and Scott, Longbrake & Van Cleve, for appellants.

Thomas Canty and Robert Christensen, for respondent.

Dickinson, J. In the spring of 1884 the defendants entered into articles of association, intending to acquire a corporate character, and probably supposed that this purpose had been accomplished. No incorporation was, however, effected. The articles of association executed by the defendants declared the purpose of the proposed corporation to be to secure the extension of a certain street in Minneapolis, and to improve and beautify the same. They provided for no capital stock, but that the funds necessary for the accomplishment of the contemplated purpose should be raised by subscription from the members. The usual officers were named, and a board of five directors provided for; meetings of the members were held; officers and a board of directors elected; by-laws adopted, which provided for the appointment of an executive committee, whose duty was declared to be to direct and superintend the work and to employ the necessary labor; subscriptions were made by all of the defendants, excepting Stark, for the purposes of the association; a contract was made between the association, by its adopted name, and certain contractors, (Egan & Salter,) for grading and improving the street, and the performance of the work under the contract was entered upon. The plaintiff was an employé of Egan & Salter, and engaged, with others, in the work. During the progress of the work, the employés of the contractors, becoming dissatisfied with their employers, ceased to work. Then two of the defendants, Mathews and Riebeth, who were respectively vice-president and secretary of the association, made an agreement with the laborers. the precise nature of which is in dispute. The evidence on the part of the plaintiff is sufficient to support what must have been the conclusion of the jury, that the agreement was that if the men would go on with the work, the association would pay them; while the evidence for the defendants tended to show that the agreement was merely to pay directly to the laborers the money which should be due to Egan and Salter on their contract. By this action the plaintiff seeks to recover against the defendants individually upon this agreement.

The attempt to become incorporated was ineffectual to limit the individual liability of the associates; and upon any contract which they may be found to have authorized to be made, or which they may have ratified, although in terms the contract was made as the contract of the association or assumed corporation, the members may be held to an individual responsibility. Hess v. Werts, 4 Serg. & R. 356; Pettis v. Atkins, 60 Ill. 454; Bigelow v. Gregory, 73 Ill. 197; Garnett v. Richardson, 35 Ark. 144; Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104; Abbott v. Omaha Smelting Co., 4 Neb. 416; Field v. Cooks, 16 La. Ann. 153; Jessup v. Carnegie, 44 N. Y. Super. Ct. 260. While, if the other contracting party were to charge the defendants in their

¹ Mitchell, J., did not hear the argument and took no part in this case.

assumed corporate capacity, they might not in some cases be heard to deny their corporate existence, yet, there being in fact no such existence, the plaintiff may go behind the assumed corporate character, and hold the real principals to responsibility for the acts of those whom they may have clothed with authority to act in behalf of the association. Bigelow v. Gregory, supra; Kaiser v. Lawrence Sav. Bank, supra; Jessup v. Carnegie, supra; Hurt v. Salisbury, 55 Mo. 310.

We deem the evidence to have been sufficient to sustain a conclusion on the part of the jury that all of the defendants, the members of the association, authorized the prosecution of the contemplated work, and knew that it was actually being carried forward under the direction of the appointed agents of the association; that the executive committee was authorized by the association to prosecute the work as its agent, and for that purpose to employ laborers; that the alleged contract upon which this action is brought was made by two members of the committee in behalf of the association; and that the whole committee, having knowledge of that fact, ratified the agreement, making payments from time to time in accordance with it. Only as to two of these particulars does the sufficiency of the evidence seem questionable, and only to that evidence shall we particularly refer.

It is in evidence that the defendant Stark did not subscribe or pay anything for the purpose of the association, and, after executing the articles of association, took no active part in the enterprise. He, however, subscribed to the articles of association, the declared purpose of which was the prosecution of this work. He was present on the occasion when the agreement sued on was made, and, as the evidence tends to show, heard the agreement then made, — that the association would pay the laborers, — although, according to his own testimony, the agreement was not such as is shown on the part of the plaintiff. We think this sufficient to warrant the conclusion that Stark was aware that the work was being carried on in behalf of the association with which he had united, and that Mathews and Riebeth in his presence assumed to make this contract as the contract of the association. If the fact were so, the mere silence of Stark might be deemed to signify his acquiescence.

It is not entirely clear from the evidence whether the agreement made by Mathews and Riebeth was communicated to all the other members of the executive committee. The by-laws adopted by the association declared that there should be an executive committee of five, of which the president, vice-president, and secretary should be ex officio members, and of which three members should constitute a quorum. But it is testified to that five members of the executive committee were elected. We are left in doubt whether the association in fact named three or five of its members, in addition to the ex officio members, as its executive committee. But this is not very material. It is distinctly testified to that the agreement made by two of the ex officio members of the committee was communicated to three of the

other members of the committee, one of whom was the president, and that they assented to it. It further appears that other members named as members of that committee were present when computations were made of the amounts to be paid to the laborers; that meetings of the committee were held, at which they took action relative to the work being carried forward under the agreement made by Mathews and Riebeth; and that during a period of several weeks the laborers were paid by direction of the committee. While this evidence is not the most satisfactory, it is still such as to justify the conclusion that the agreement, as testified to on the part of the plaintiffs, was communicated to the executive committee as a whole, and was ratified and adopted by them. Nothing further was necessary to charge the defendants with liability.

The plaintiff asserts, as a rule of law applicable to the case, that, from the mere failure to perfect the contemplated incorporation, the association, after proceeding to carry on the proposed enterprise, became a partnership, and the members copartners, with authority (implied from their relations) in each member to bind all of the associates by any act within the scope of the business carried on by the association. We cannot sanction the application to this case of the doctrine of implied agency as it is recognized in ordinary business copartnerships. If it be conceded that the principle upon which the plaintiff relies exists and is applicable in cases where the business contemplated and carried on by the association, and the purposes for which it is prosecuted, are such as involve the essential elements of a partnership undertaking, or where the articles of association contain all that is essential to create a partnership, — still the principle is not applicable to this case, in which those conditions do not exist. So far as appears, the business undertaken and carried on by the defendants was not of a partnership character, nor the purposes such as to suggest the relation of copartners between those engaged in it. It was only the grading of a public street by the co-operation of these several persons, and that, so far as appears, for no purpose of gain or profit. This would not have constituted those uniting and contributing for such a purpose copartners; nor can such a result have been accomplished by the further fact that an incorporation was contemplated, and attempted to be perfected, but failed. We deem the liability of the defendants to rest upon the ordinary principles of contract and agency, and not upon the ground of an existing copartnership.

The articles of association executed by the defendants were properly received in evidence. This evidence went to show the co-operation of the defendants in the enterprise in carrying on which the contract sued on was made. The same is true of the proof of contributions of money from the defendants.

Order affirmed.

SNIDER'S SONS CO. v. TROY.

1890. 91 Alabama, 224.1

Action for goods sold by plaintiffs, in 1888, to, or on the order of, The Dispatch Publishing Co. The complaint alleged that said Company was at the time a partnership, and that defendant was one of the partners; that the Company claimed to be a corporation, but was never in fact incorporated. Plea, setting out certain steps taken, in 1885, by defendant and other persons to organize a corporation by the above name; also alleging that the debt now sued for was contracted by said Company as such corporation, and not otherwise; and that plaintiff dealt with it as a corporation, and not as a partnership or association of individuals. A demurrer to the plea was overruled.

E. P. Morrissett, for appellant.

Tompkins & Troy, contra.

CLOPTON, J. A corporation de facto exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and with the powers assumed, and a user of the rights claimed to be conferred by the law, when there is an organization with color of law, and the exercise of corporate franchises and functions. M. E. Church v. Pickett, 19 N. Y. 482; Stout v. Zulick, 48 N. J. Law, 599, 7 Atl. Rep. 362.

The enabling law under which a corporation for the purposes and objects of the Dispatch Publishing Company, and with the powers assumed, might have been lawfully created at that time, is contained in sections 1803-1812 of the Code of 1876, and the amendatory acts, which authorize and provide for the incorporation of two or more persons desirous of forming a private corporation for the purpose of carrying on any industrial or other lawful business not otherwise specially provided for by law. Acts 1882-83, p. 40. The plea avers that defendant and two other named persons filed, September 2, 1885, with the judge of probate of Montgomery county, a written declaration. signed by themselves, setting forth substantially the matters required by the statute, except the residences of the persons, that they organized by the election of three directors, and commenced and continued to do business in a corporate capacity, and were so doing business when the debt sued for was contracted. If the averments of the plea be true, the truth of which is admitted by the demurrer, the Dispatch Publishing Company was an association having capital stock divided into shares, organized by the election of officers, and transacting business, and exercising franchises, functions, and powers, after an at-

¹ Statement abridged. Arguments omitted. - Ep.

tempted incorporation, as if it were a corporation dejure, a colorable compliance with the requirements of an existing and enabling law, and user of the rights claimed to be conferred thereby, the essential elements of a corporation de facto. Central, A. & M. Ass'n v. Alabama G. L. Ins. Co., 70 Ala. 120.

Appellant seeks by the action to hold defendant, who was a member, liable as a partner for paper and other supplies sold to the Dispatch Publishing Company. Whether the shareholders in a corporation de facto are individually liable for the corporate debts, in the absence of fraud or a statute, is a question as to which the authorities are in direct antagonism. In Cook, Stocks, § 233, the doctrine asserted is: "A corporate creditor, seeking to enforce the payment of his debt, may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question." The leading cases supporting this doctrine are Bigelow v. Gregory, 73 Ill. 197; Abbott v. Smelting Co., 4 Neb. 416; Garnett v. Richardson, 35 Ark. 144; Ferris v. Thaw, 72 Mo. 446; Ridenour v. Mayo, 40 Ohio St. 9; Coleman v. Coleman, 78 Ind. 344. We have omitted reference to a few cases, sometimes cited, for the reason, that either the question of liability as partners was not before the court, as in Blanchard v. Kaull, 44 Cal. 440; or the debt was contracted before any steps were taken, other than the mere filing of a certificate, towards organization, as in Bergen v. Fishing Co., (N. J.) 3 Atl. Rep. 404; or it was contracted after the expiration of the charter by its own limitation without reorganization, as in Bank v. Landon, 45 N. Y. 410. In the case last cited, the shareholders entered into a special agreement, which by its terms created a partnership as to third persons. In 2 Mor. Priv. Corp. § 748, the doctrine is stated as follows: "If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members cannot be charged as parties to the contract, either severally or jointly or as partners." The following cases maintain the doctrine that the members of a corporation de facto cannot be held liable as partners for the corporate debts. Fay v. Noble, 7 Cush. 188; Bank v. Almy, 117 Mass. 476; Stout v. Zulick, 48 N. J. Law, 599, 7 Atl. Rep. 362; Bank v. Padgett, 69 Ga. 164; Bank v. Stone, 38 Mich, 779; Humphreys v. Moonev. 5 Colo. 282; Bank v. Walker, 66 N. Y. 424; Coal Co. v. Maxwell. 22 Fed. Rep. 197; Whitney v. Wyman, 101 U. S. 392.

The plea and demurrer do not raise the question of the liability of the supposed stockholders, as partners, where there has been no intention or attempt to incorporate, where they are acting as a body corporate without even color of legislative authority, hy sheer usurpation. The plea avers that the debt sued for was contracted by the Dispatch Publishing Company, which is alleged to have been a de facto corporation, and that plaintiff sold the goods to, and contracted with, the com-

pany as a corporation, knowing that it was doing business as such. The question before us, and the only question we propose to decide, is whether, there being no fraud alleged, nor statute making the stockholders individually liable, a creditor, who has dealt with a de facto corporation as a corporation, who has entered into contractual relations with it in its corporate name and capacity, can disregard the existence of the corporation, and, electing to treat it as a partnership, enforce the collection of his debt from the stockholders individually? The conflicting authorities afford aid in the solution of this question, only so far as their opinions may be in accord with settled principles and sustained by reason. Though it is an undecided question in this state, principles have been well settled which materially bear upon the inquiry, and mark the way to a correct conclusion.

Corporations may exist either de jure or de facto. If of the latter class, they are under the protection of the same law, and governed by the same legal principles, as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, and who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation, and whose authority is usurped. This principle was clearly and emphatically declared in Lehman v. Warner, 61 Ala. 455, in the following language: "The corporation must of necessity be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the state - the sovereign - whose rights are invaded and whose authority is usurped. The individual could not create the corporation, could not grant, define, limit its powers, and no grant of these by the sovereign can lessen his rights. There can consequently be no cause of complaint by the citizen, and no right to inquire whether corporate existence is rightful de jure, or merely colorable." Taylor, Corp. § 145; 4 Amer. & Eng. Enc. Law, 198. The creditor cannot proceed against the stockholders as partners, without proving non-compliance with prescribed conditions precedent, thus inquiring collaterally, not into the fact, but the legality, of its existence.

It is also an established rule of general application, that a party who contracts with a corporation, exercising corporate powers and performing corporate functions, existing as a de facto corporation, in its corporate name and capacity, will not be permitted in a suit on the contract to deny and disprove the rightfulness of its existence. 4 Amer. & Eng. Enc. Law, 198. In Swartwout v. Railroad Co., 24 Mich. 390, Cooley, J., declares the rule as follows: "Where there is thus a corporation de facto, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is

what it professes to be, and the questions are only whether there has been exact regularity and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy, that, in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised."

The general rule is thus stated by BRICKELL, C. J.: "Whoever contracts with a corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought." Cahall v. Association, 61 Ala. 232; Central A. & M. Ass'n v. Alabama G. L. Ins. Co., 70 Ala. 120; Schloss v. Trade Co., 87 Ala. 411, 6 South. Rep. 360.

It is conceded that the rule has been invoked and applied most frequently in suits against the stockholders or corporation or persons who have contracted with it, where the stockholder, or corporation, or person, is seeking to avoid a liability by denying the legality of the corporate organization. But why should it not be applicable in other cases? Why should the stockholder be estopped in a suit by a creditor of an insolvent corporation to require payment of his unpaid subscription, and the creditor allowed to ignore the existence of the corporation. and proceed against the stockholder as a partner? Why should not the estoppel be mutual? Taylor, in his work on Corporations, § 148, having stated the general rule, that a corporation, when sued on its contract, and the person who contracted with it, when sued on his contract, is estopped to denyits legal incorporation, adds: "Furthermore, persons who have contracted with a corporation as such, and have acquired claims against it, are estopped from denying its corporate existence for the purpose of holding its shareholders liable as part ners." And the same rule was applied in several of the cases cited above, in which a corporate creditor was seeking to hold the stockholder liable as a partner for a corporate debt. The abrogation of the foregoing well-established rule is the logical sequence of maintaining a suit by a creditor of a de facto corporation, charging the stockholders as partners.

Another consideration. Section 8, art. 14, of the constitution, declares: "In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her." Exemption from liability other than for unpaid stock is the declared policy of the state. It cannot be imposed by legislation or by the judgment of a court. In view of the constitutional provision it is manifest that the shareholders of the Dispatch Publishing Company intended, by the attempt to incorporate, to avoid individual liability for the debts contracted by the corporation. When a party deals and contracts with a corporation as corporators, exemption from individual liability enters as an element of the contract. It is true that the liability of persons associated in an

enterprise or adventure is not determinable by the name they may assume, but by the legal consequences of their acts. A partnership may arise as to third persons by mere operation of law, and contrary to the intention of the parties, but, to have the effect, the elements essential to constitute a partnership as to third persons must exist. A corporation de facto has an independent status, recognized by the law as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation. As said in Fay v. Noble, supra: "Surely, it cannot be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners, a liability neither contemplated nor assented to by them. The statement of the proposition carries with it a sufficient refutation."

Maintenance of such suit involves judicial nullification of franchises and powers enjoyed and exercised by a de facto corporation as a distinct entity recognized by the law, acquiesced in by the state; defeats the corporate character of the contract; changes the relation from that of stockholders to that of partners; substitutes other and new parties to the contract; effects the imposition of an enlarged liability, which they did not assume, but intended to avoid, so understood by the creditor when he contracted the debt with the corporation as such. The contract is valid and binding on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle, that the corporation and the shareholder are estopped from denying its legal existence, as against him. It will not answer to say that he is not repudiating, but enforcing, the He repudiates the party, the corporation, with which he made the contract, and seeks its enforcement against parties who never entered into contractual relation with him. The doctrine that a creditor who has dealt with a de facto corporation in its corporate capacity cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning consistent with well-settled principles, and in harmony with the policy of the state. Affirmed.

RUTHERFORD v. HILL.

1892. 22 Oregon, 218.

MULTNOMAH county: E. D. SHATTUCK, Judge.

Defendants appealed. Reversed.

The defendants are sued as partners under the name and style of the Himes Printing Company. The complaint does not anywhere allege that the defendants entered into an agreement of co-partnership, but in lieu thereof the following facts are alleged: "That the defendants, on

or about the fifth day of September, 1890, executed, acknowledged, and filed in the office of the clerk of the county court of Multnomah county, and in the office of the secretary of state at Salem, Oregon, certain articles of incorporation as the Himes Printing Company; that the defendants, in violation of the laws for the formation of corporations subsisting in the state of Oregon, negligently failed to provide a stock-book and to secure stock subscriptions to said corporation; that in spite of their said violation of the law, the defendants undertook to carry on the business provided for in said articles of incorporation, appointed one George H. Himes superintendent of their said business, and authorized him and the defendant Sherman Martin to represent them in all the transactions of said business; that said business was carried on under the firm name and title of the Himes Printing Company; that between May 1, and September 1, 1891, the plaintiff, at the instance and request of the defendants, through their agents, the aforesaid Himes and the defendant Martin, performed certain labor and services for the defendants, of the reasonable and agreed value of two hundred and thirteen dollars and fourteen cents, which sum the defendants promised to pay; that the plaintiffs performed the aforesaid work, relying on the credit and representations of the defendants for their payment."

Earhart and Hill answered separately, and each of them denied every material allegation of the complaint, except they did not deny executing and filing the articles of incorporation of the Himes Printing Company.

The jury returned a verdict against the defendants Earhart and Hill for the amount claimed, and a judgment was entered thereon, from which this appeal was taken.

George H. Durham, and J. F. Watson, for Appellants.

Wallace M' Cammant, for Respondents.

STRAHAN, C. J. — At the conclusion of the evidence, the defendants Hill and Earhart asked the court to instruct the jury as follows: "1. The execution and filing of the articles of incorporation of the Himes Printing Company by said Hill and Earhart, in connection with the defendant Sherman Martin, would not itself make them partners with Martin, or render them liable in this action. 2. Said defendants Hill and Earhart cannot be charged in this action unless it has been shown by a preponderance of the evidence that they had notice of their being held out as such partners, and plaintiffs also had notice thereof before or at the time they performed the labor and services alleged in the complaint and performed the same on the faith thereof. 3. The plaintiffs cannot recover in this action against Hill and Earhart, unless it has been proved by a preponderance of the evidence that said Hill and Earhart were partners in said printing company at the time the contract for said labor and services was entered into, or at the time the same were performed, or at the time the contract was entered into, or said labor and services performed, undertook to carry on said business of said company, or were interested as partners or appointed or participated in the appointment of George H. Himes as superintendent of said business, or authorized him or said Martin to represent them in the transaction of said business, or requested through said Himes or Martin the plaintiffs to perform said labor and service." No. 4 was in effect a direction to the jury to return a verdict for the defendants Hill and Earhart. The defendants excepted to the rulings of the court in refusing to give each of the foregoing instructions.

The court then instructed the jury as follows: "I cannot agree with you, Mr. Durham and Judge Watson, that there may not be some other reasons why parties should not be bound than such as usually arise from an estoppel. Since this case has been going on, it has occurred to me whether or not this may not furnish a class of itself for pronouncing a man to be a partner. As a general rule, the doctrine of estoppel has got to be made out according to the authorities you have read; but I am inclined to the opinion that the mere act of filing articles is itself a holding out and notice to the world that they are associated in the business that is carried on under the name. I do not feel very certain about it, but my best conception of this matter is that it ought to be considered the rule." An exception to this instruction was duly The court also gave the following instruction: "If you find from the evidence in this case that these two defendants and Sherman Martin filed articles of incorporation for the purpose of carrying on the printing business under the name of the Himes Printing Company, and that thereafter one of these men, to-wit, Sherman Martin, took up the business contemplated by this corporation, and carried it on under that name, and incurred liabilities, then all these incorporators that signed the articles are liable, and your verdict should be for the plaintiffs for the amount claimed, provided you further find that, before they performed the labor and rendered the services, they ascertained the fact of these articles being filed, and acted on the faith of the association of these defendants with Sherman Martin, and that they were induced thereby to perform the labor and render the services." An exception was also taken to this instruction.

There was no evidence whatever before the jury that these defendants had anything to do with the business of the Himes Printing Company, or in any way authorized the same, except to sign the articles of incorporation. They appointed no agents and employed no laborers, purchased no material, nor did they have any knowledge that any business was conducted under that name, except the company did some printing for the defendant Hill; and when a bill was presented to him for the same it had at the top, printed in bold letters, "The Himes Printing Company, incorporated; Geo. H. Himes, Superintendent; Sherman Martin, Manager." There was no evidence before the jury that the plaintiffs had any actual knowledge of the filing of the articles of incorporation at the time they performed the services sued for.

The sole question, therefore, seems to be whether or not, where

three or more persons sign, acknowledge, and file articles of incorporation under the laws of this state, and do nothing further towards effecting an organization or carrying on the proposed business, and one of them assumes to do business under the proposed corporate name and incurs liabilities, the other persons who sign said articles are liable. Appellants maintain that in such case there is no liability on the part of those who do not participate in the business either directly or indirectly, while the respondents seek to maintain the reverse of this proposition; and this contention presents the only question we need consider on this appeal.

The respondent contends that the executing and filing of the articles of incorporation and the assumption of the corporate name by one of the parties under which he does business, create a partnership between all the persons signing said articles; and to sustain this view he relies upon these authorities: Whipple v. Parker, 29 Mich. 369; Jessup v. Carnegie, 44 N. Y. Sup. Ct. 260; Coleman v. Coleman, 78 Ind. 344; Pettis v. Atkins, 60 Ill. 454; Smith v. Warder, 86 Mo. 382; Garnett v. Richardson, 35 Ark. 144; Lind. Part. 5; Abbott v. Omaha Smelting Co., 4 Neb. 416; Johnson v. Corser, 34 Minn. 355. Some other authorities similar to these in principle, might be cited, but they add nothing to this side of the question. Without stopping to distinguish these cases from the one now before us, we think the decided weight of authority, as well as the better reason, is the other way. Fay v. Noble, 7 Cush. 188, is an early case in which it was held that the subscribers for and holders of stock in a manufacturing corporation, which has been defectively organized and transacted business under such defective organization, do not thereby become partners, general or special, in such business. In Trowbridge v. Scudder, 11 Cush. 83, it was held that the stockholders of a corporation do not become liable as partners on notes given by the treasurer of the corporation, merely because after organizing they transacted no business. In First Nat. Bank v. Almy, 117 Mass. 476, it was held that the members of a corporation were not liable as partners by reason of having transacted business before the whole capital stock was paid in as required by In Humphreys v. Mooney, 5 Col. 282, in considering the question now before the court, it was said: "The doctrine of a partnership liability in such case is not founded in law reason, and is repugnant to the very purposes of the statute authorizing a corporation, one object of which is to limit individual liability." Substantially, the same doctrine is announced in Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197; Planters' etc. Bank v. Padgett, 69 Ga. 159; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Ward v. Brigham, 127 Mass. 24; Central etc. Bank v. Walker, 66 N. Y. 424; Jessup v. Carnegie, 80 N. Y. 441; 36 Am. Rep. 643; Blanchard v. Kaull, 44 Cal. 440; Morawetz Corp. § 748. And 17 Am. & Eng. Ency. Law, 866, after stating that the rule contended for by respondents had been adopted by quite a large number of cases, remarks: "But the weight of authority perhaps sustains the contrary rule, that if they were acting under the supposition that they were incorporated, and were assuming only the liability of stockholders, and not that of partners, they will not be held liable as such"; and a long list of cases is cited to sustain this proposition.

It is not doubted that cases might arise and can readily be imagined where the incorporators sought to be charged might take such part in conducting the business, or hold themselves out to the world as partners or as principals in the business, that they would be held liable; but this would grow out of their conduct in carrying on the business, and not out of the mere fact of signing and filing the articles. If the appellants could be held liable in this case, such liability would rest on the mere act of signing and filing the articles, and not upon any participation in the business, either directly or indirectly. It would have to rest upon the theory, that by the mere signing the articles with Martin, they constituted him their general agent to proceed to conduct the business contemplated by the proposed corporation, thus creating a liability for any act of his done within the scope of the powers of the proposed corporation.

No authority to which our attention has been directed, has gone so far, and we feel safe in saying that none can be found to support that doctrine. We therefore reverse the judgment, and remand the cause for such further proceedings as are not inconsistent with this opinion.

BUSHNELL v. CONSOLIDATED ICE MACHINE CO.

1891. 138 Illinois, 167.1

Surf in chancery to have the Consolidated Ice Machine Co. declared a copartnership, and its affairs settled between the complainant and defendants accordingly. In the court below, the demurrer was sustained and the bill dismissed.

The following facts appear from the bill: In 1884 the complainant and the individual defendants entered into a written agreement to form a corporation, with the above title, under the laws of the State; all the required steps were taken, up to and including the issuing of a certificate of the complete organization of such corporation by the Secretary of State; complainant was a director; and for several months secretary and soliciting agent, actively engaged in its business. In 1885 complainant became afflicted with melancholia and remained incapacitated for the transaction of business for about three years. During his sickness, the other directors sold some of his shares for non-payment of installments, the sale being without notice. Since the sale he has been excluded from all participation in the

¹ Statement abridged. Arguments and part of opinion omitted. - ED.

management of the business. After being restored to health, and before filing his bill, he made frequent demands to be restored to his rights in said corporation, but without avail.

The only allegation of the bill which is seriously insisted upon as furnishing a ground for the relief prayed is, that the certificate of complete organization, issued by the Secretary of State was never recorded in the office of the recorder of deeds in the county where the principal office of the company was located. The statute requires that "the same shall be recorded" in that office.

WILKIN J.

But assuming that a corporate existence de jure depends upon the filing of the certificate of complete organization in the office of the recorder of deeds of the county in which its principal office is located, and that the bill properly avers that it was not done in the case of the corporation in question, it by no means follows that it did not become a corporation de facto as between the complainant and defendants. From the facts set up in the bill it clearly appears that there was an honest attempt by the incorporators to organize a corporation authorized by the laws of this State. The necessary steps to perfect that organization were all taken as required by the statute, except that the final certificate was not recorded. It is shown by the bill that upon the issuing of that certificate its directors elected the proper officers and proceeded to the transaction of business as a corporation, and continued to act as such until the filing of this bill, a period of more than five years. That these facts establish a corporation de facto is settled by numerous decisions of this court. President and Trustees, etc. v. Thompson, 20 Ill. 198; Rice v. R. I. and A. R. R. Co. 21 id. 93; Baker et al. v. Administrator, 32 id. 79; Ramsey v. Marine and Fire Ins. Co. 55 id. 311; Cincinnati, Lafayette and Chicago Railroad Co. v. Danville and Vincennes Ry. Co. 75 id. 113; Louisville, New Albany and Chicago Ry. Co. v. Shires, 108 id. 617; Hudson v. Green Hill Seminary Corporation, 113 id. 618.

That plaintiff in error, if he had been sued by the Consolidated Ice Machine Company on his subscription to its capital stock, could not have questioned its corporate existence on the grounds alleged in his bill, is directly settled by several of the above cited decisions. It is equally clear that if, during the time he was a member of said corporation, it had been sued as such, neither he nor any other of its members could have been heard to say that no such corporation existed. The general rule is, that one who deals with a corporation as existing de facto, is estopped to deny, as against it, that it has been legally organized. It is the settled rule in this State that the legal existence of a corporation de facto can not be questioned collaterally. See cases supra, and Renwick et al. v. Hall et al. 84 Ill. 162; The People ex rel. v. Trustees of Schools, 111 id. 171; Keigwin et al. v. Drainage Comrs. 115 id. 347.

It seems impossible to find a reason for placing the complainant in this bill in a more favorable position to deny the existence of the corporation in question than a mere subscriber to its capital stock, or one who, as a third party, had dealt with it as a corporation, and we are of the opinion that he could not do so in this collateral proceeding. He. however, not only seeks to question the legal organization of the corporation, but to have the same changed into a co-partnership between himself and the other incorporators, and to compel the defendants to account to him as his co-partners. "A partnership is never created) between parties by implication or operation of law, apart from an express or implied intention and agreement to constitute the relation." (1 Bates on Law of Partnership, sec. 3.) In Phillips v. Phillips, 49 Ill. 437, Caton, C. J., said: "A partnership can only exist in pursuance of an express or implied agreement, to which the minds of the parties have assented." This rule will not prevent the enforcement of liability against persons as partners, when sued by third parties. "Parties may so conduct themselves as to be liable to third persons as partners, when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain proof is positively known to the alleged parties to a firm." (Phillips v. Phillips, supra.) On this latter ground parties who have attempted to organize a corporation, but have failed to comply with the law, so as to perfect their incorporation, may be held liable as partners to creditors, as in Bigelow v. Gregory et al. 73 Ill. 197. This liability rests on the doctrine of estoppel. When, however, even a creditor has dealt with the corporation as such, partnership liability can not be enforced, even though the corporation has not been legally organized. Tarbell v. Page, 24 Ill. 46.

It is wholly unnecessary, however, in this case, to determine when and under what circumstances third parties may proceed against incorporators acting under a defective or imperfect organization, as individuals or co-partners. In this case the complainant shows by his bill that he was not only one of the incorporators of the company he now seeks to question, but that he was, upon its complete organization, elected its secretary and general agent, and acted as such for several months prior to his alleged disability, during which time he was actively engaged in assisting to carry on its corporate business, and that upon his being restored to health he still recognized its corporate existence, and sought to be restored to his rights therein. If the recording of the certificate in question was essential to the organization of the corporation, there is nothing in this bill to show that it was not as much his duty to have it done as either of the other incorporators. We are unable to perceive, then, upon what principle he can now compel those who, for anything appearing in this bill, honestly supposed they were incorporated during all the time the business mentioned in the bill was being carried on, to account to him, upon the

theory that they were his co-partners. In fact, if the allegation as to his mental condition at the time his stock was sold was omitted from the bill, it would strike any one as too clear for argument that he has failed to state a case entitling him to equitable relief, and it must, we think, be held, that whether that fact, together with the allegation that his stock was sold without notice and he ousted from all participation in the business of the company, would entitle him to his action for that alleged wrong, or to be restored to his former rights as a member of said corporation or not, no legal ground is shown by this bill for holding defendants liable to him as partners.

There is nothing in the case of Flagg v. Stove, 85 Ill. 166, when the facts of that case are considered as they appear in that report, and in Stowe v. Flagg et al. 72 Ill. 397, contrary to the view here expressed. We have examined the numerous cases cited by counsel for plaintiff in error as giving support to the position that a corporation defectively organized may be treated as a co-partnership, and the members held liable as partners; but when it is borne in mind that complainant himself was a member of the corporation in question, and in no sense a third party, and that he is not seeking by this bill to recover for anything which he has been required to pay third parties for or on behalf of said corporation, they have no application. What he seeks to do is to have the corporation converted into a partnership, contrary to the contract of the parties, simply because he and other incorporators failed to perfect, as he says, the corporation. He does not even show that he has been misled or in any way injured by the failure to have the certificate of complete organization recorded. Neither does he pretend that the omission of any of the incorporators to have the same recorded was willful, or in any way designed to injure him or others.

We can find neither authority nor reason to sustain this bill, and are clearly of the opinion that the decree of the circuit court is right.

Decree affirmed.

SNYDER v. STUDEBAKER.

1862. 19 Indiana, 462.

APPEAL from the Wells Circuit Court.

Worden, J. This was an action by *Snyder* against *Studebaker*, to recover possession of a certain tract of land. Judgment for the defendant.

The same question is presented by the pleadings and the evidence. It appears that, in March, 1853, the plaintiff, who was then the

owner of the land, conveyed the same to the Fort Wayne and Southern Railroad Company, by deed, duly executed and delivered.

This conveyance was made on account of a stock subscription.

Afterward, in November, 1855, the railroad company, for a valuable consideration, conveyed the premises to the defendant.

The Fort Wayne and Southern Railroad Company was chartered by an act of the legislature, passed in 1849; and it appears that the corporators named in the act in question met in the town of Bluffton, in said county of Wells, on the 19th day of November, 1851, and then and there accepted the act of incorporation, and organized the company pursuant to the provisions of said act.

If the corporation was not created before the 1st of November, 1851, when the new constitution took effect, it could have no existence at all, as that instrument prohibits the creation of corporations, other than banking, by special act. The State v. Dawson, 16 Ind. 40. Harriman v. Southam, Id. 190.

The plaintiff claims, that inasmuch as there was no acceptance of the charter, or organization under it, until after the adoption of the constitution of 1851, there was no such corporation as The Fort Wayne and Southern Railroad Company at the time he executed the conveyance, and, hence, that no title passed from him. But is he in a condition to dispute the existence of the corporation at the time he made his conveyance to it?

It has been held, in numerous cases in this State, that a party who has contracted with a corporation, as such, is, as a general proposition, estopped by his contract to dispute the existence of the corporation at the time of the contract. The following cases may be cited, though there are, perhaps, others reported, and some not reported as yet. Judah v. The American Live Stock Insurance Company, 4 Ind. 333. The Brookville and Greensburg Turnpike Company v. McCarty, 8 Id. 392. Ensey v. The Cleveland and St. Louis Railroad Company, 10 Id. 178. Fort Wayne and Bluffton Turnpike Company v. Deam, Id. 563. Jones v. The Cincinnati Type Foundery Company, 14 Id. 89. Hubbard v. Chappell, Id. 601. The Evansville, etc. Railroad Company v. The City of Evansville, 15 Id. 395. Meikel v. The German Savings Fund Society, 16 Id. 181. Heaston v. The Cincinnati and Fort Wayne Railroad Company, Id. 275.

The doctrine is by no means confined to the State, but prevails elsewhere. The Dutchess Cotton Manufactory v. Davis, 14 Johns. 238. All Saints Church v. Lovett, 1 Hall, 191. Palmer v. Lawrence, 3 Sand. Sup. C. R. 161. Eaton v. Aspinwall, 6 Duer, 176. Jones v. Bank of Tennessee, 8 B. Mon. 122. Worcester Medical Institution v. Harding, 11 Cush. 285. The Congregational Society v. Perry, 6 N. H. 164. People's Savings Bank, etc. v. Collins, 27 Conn. 142. West Winsted Savings Bank v. Ford, Id. 282. Angell and Ames on Corp., sec. 94.

The estoppel arises upon matter of fact only, and not upon matter of

law. Hence, if there be no law which authorized the supposed corporation, or if the statute authorizing it be unconstitutional and void, the contract does not estop the party making it, to dispute the existence of the corporation. But if, on the other hand, there be a law which authorized the corporation, then, whether the corporators have complied with it, so as to become duly incorporated, is a question of fact, and the party making the contract is estopped to dispute the organization or the legal existence of the corporation. This proposition is substantially stated in the cases of Jones v. The Cincinnati Type Foundery Company; Meikel v. The German Savings Fund Society; and Heaston v. The Cincinnati and Fort Wayne Railroad Company, supra.

Let us apply the doctrine to the case before us. The corporators named in the act to establish the Fort Wayne and Southern Railroad Company had a right, at any time before the offer of the franchises was withdrawn, that is, before the constitution of 1851 was adopted, to accept the charter, and organize under it. If they did so accept the charter, and organize, the corporation was legitimately created, and the new constitution did not destroy it.

Whether they did so accept the charter, and organize, was a question of fact, and the plaintiff, by his conveyance, is estopped to deny such acceptance and organization.

That the corporators accepted the charter, and organized under it, within the time when it was competent to do so, was as fully admitted by the contract, as was any other step necessary to an organization.

The conclusion necessarily follows, that the plaintiff is estopped to dispute the existence of the corporation at the time of his conveyance to it.

This point was ruled the other way in the case of *Harriman* v. *Southam*, 16 Ind. 190, but, upon more more mature reflection, we are satisfied that the decision upon this point was wrong, and should be overruled.

We may remark, also, that the doctrine of estoppel was erroneously applied in the case of *The Evansville*, etc. Railroad Co. v. The City of Evansville, 15 Ind. 395. There the point made was, that the law, under which the corporation was organized, was unconstitutional and void. A party, we have seen, does not, by his contract, estop himself to deny that there is any law, or any valid law, by which the corporation was authorized.

Some further observation, in respect to the case before us, will not be out of place. The doctrine of estoppel, as applied to the case, does not rest upon a mere technical rule of law. It has its foundation in the clearest equity, and the principles of natural justice. The doctrine of estoppel, in pais, is of comparatively recent growth, but is firmly and clearly established. "The recent decisions of the courts, both in this country and in England, appear to have given a much broader sweep to the doctrine of estoppel in pais, than that which formerly existed,

and to have established that, in all cases where an act is done, or a statement made, by a party, the truth or efficacy of which it would be a fraud, on his part, to controvert or impair, there the character of an estoppel will be given to what would otherwise be mere matter of evidence, and it will, therefore, become binding upon a jury, even in the presence of proof of a contrary nature." 2 Smith, Lead. Ca. p. 531, 1 Am. Ed. See, also, upon this subject, Kinney v. Farnsworth, 17 Conn. 355. Middleton Bank v. Jerome, 18 Id., 443. Laney v. Laney, 4 Ind. 149. In Doe ex dem. Richardson v. Baldwin, 1 Zabriskie, 397, it was said, that "The doctrine of estoppel rests upon the principle, that when one has done an act, or made a statement, which it would be a fraud, on his part, to controvert or impair, and such act or statement has so influenced any one that it has been acted upon, the party making it will be cut off from the power of retraction. It must appear, 1. That he has done some act, or made some admission inconsistent with his claim; 2. That the other party has acted upon such conduct or admission; 3. That such party will be injured by allowing the conduct or admission to be withdrawn." Here the plaintiff, by his conveyance to the corporation, admitted that it had an existence, and could receive the title. Upon this act and admission of the plaintiff the defendant has acted, in purchasing the land of the company. If the plaintiff had not conveyed to the corporation, the defendant would not have purchased from it. The law will not now permit the plaintiff to withdraw the admission made by him in conveying to the corporation, and deprive the defendant of the land which he purchased on the faith of such admission.

In our opinion, the judgment below is right, and must be affirmed. Per Curiam. — The judgment is affirmed, with costs.

John R. Coffroth, for the appellant.

SOCIETY PERUN v. CLEVELAND.

1885. 43 Ohio State, 481.1

Error to the District Court of Cuyahoga County.

Action by city of Cleveland to foreclose a mortgage, as against certain subsequent grantees, mortgagees, and purchasers. Perun, a corporation, Jan. 28, 1874, executed and delivered a mortgage to the city. This mortgage was not filed for record until Oct. 21, 1879. In February, 1874, certain persons attempted to organize, under general laws, a corporation by the name of Society Perun. In May, 1874, Perun delivered to Society Perun its deed, purporting to convey to the latter the premises theretofore mortgaged to the city. Between that date and Oct. 21, 1879, Society Perun, acting in its supposed corporate

¹ Statement abridged. Arguments omitted - ED.

capacity, executed and delivered deeds and mortgages, purporting to convey and incumber parcels of these mortgaged premises to various parties, who are made defendants in the present suit. During the pendency of the present foreclosure suit, it was adjudged, in a Quo Warranto proceeding, instituted by the Attorney General, that the persons who attempted to incorporate under the name of Society Perun had not been legally incorporated, and that their attempted organization as a corporation was wholly void; and a decree of ouster was rendered. Upon the trial of the present foreclosure suit in the District Court, the plaintiff gave in evidence, against the objection of the defendants, the record of the Quo Warranto proceedings. Defendants offered evidence tending to prove an attempt in good faith to incorporate Society Perun. This evidence was excluded, and defendants excepted. The District Court found, among other things, that, as to the city of Cleveland, Society Perun was not a corporation either in law or in fact; that the conveyance to it by Perun was void as against the city; and that the claims of all the defendants (except certain claims for taxes and improvements) were subsequent and inferior to the lien of the city. reverse the judgment rendered upon these findings, error was brought.

Willson & Sykora, for plaintiff in error.

- B. R. Beavis, for executors of Stone, cross-petitioners in error.
- A. T. Brinsmade and W. E. Sherwood, for city of Cleveland.

Owen, J. The defendants below, conceding that Society Perun had never been a corporation de jure, maintain that the court below should have permitted them to prove that such society was a de facto corporation; that it attempted, in good faith, to become a body corporate; proceeded to act and transact business in good faith under the supposed authority of incorporation, and that its acts ought not to have been declared to be wholly void as against the city of Cleveland.

The judgment of ouster was an adjudication between the state and the society upon the right of the latter to exercise corporate franchises. For the purposes of such adjudication it was competent for this court to consider and determine what had been its *status* from its first attempt to incorporate. But it had no power to pass upon or determine the rights of parties not before it.

It was not competent for this court to determine in that proceeding that Society Perun had never been a corporation de facto, or that its acts and business transactions, under the color of its supposed charter powers, were void. The authority of the court in that behalf was derived from sec. 6774 (Rev. Stats.), which provides: "When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs."

When the court had excluded the society from its franchises to be a corporation, it exhausted its jurisdiction over the subject-matter. It had no power to speak concerning whatever rights may have been

acquired by the society as a corporation de facto, or by third parties in their transactions with it as an acting corporation.

It is conceded by the city that parties who had recognized the existence of the society by their transactions with it as a supposed corporation are estopped to deny its corporate existence. But it is maintained that the city, having engaged in no transactions with it, is free to challenge its existence as a corporation de facto as well as de jure. The argument is that: "No case can be found where it is held that there is a corporation de facto against persons who have in no way recognized its existence as a corporation," and that: "The notion of a de facto corporation is based on the doctrine of estoppel; when estoppel can not be invoked there can be no de facto corporation."

The theory that a de facto corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A de facto corporation is a reality. It has an actual and substantial \ legal existence. It is, as the term implies, a corporation.

"It is a self-evident proposition that a contract can not be made with a corporation unless the corporation be in existence at the time. A real contract with an imaginary corporation is as impossible, in the nature of things, as a real contract with an imaginary person. It is essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, at least de facto, at the time the contract was made." Morawetz Private Corporations, sec. 137.

It is bound by all such acts as it might rightfully perform as a corporation de jure. Where it has attempted in good faith to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.

Proof was offered upon the trial below to show, (1) that the persons seeking to incorporate first filed with the secretary of state a certificate which fully complied with the requirements of the statutes, and free from the defect which finally proved fatal to its existence, but which was disapproved by the attorney-general; (2) That the certificate of incorporation which was finally filed with the secretary of state recited that, "said association has been formed and organized for the mutual protection and relief of its members, and for the payment of stipulated

sums of money to the families or heirs of the deceased members of said association; that the officers of said association have been duly chosen; that for the purpose of becoming a body corporate under an act passed by the general assembly of the state of Ohio, entitled, an act supplementary to an act, entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852, passed April 20, 1872; "(3) That this certificate was approved by the secretary of state, and also by the attorney-general, as provided by the statutes (69 Ohio L. 150); (4) That it proceeded in good faith to transact business peculiar to corporations provided for by the act under which it attempted to incorporate.

All this was excluded, and the decision of the court below practically rested on the proof offered by the city, that Society Perun had been ousted of its franchises, which was evidently construed as determining that such society had from the first no corporate existence, either de jure or de facto, and consequently no capacity to receive or impart any interest in or title to real estate except as against such parties as were by reason of their recognition of or dealings with it, estopped to deny its incorporate existence.

Did the court err? This fairly presents the controlling and very important question: Was it competent to show, as against a party who was not estopped to deny its corporate existence, that Society Perun was, at the time of the transactions involved in controversy, a corporation de facto?

In Attorney-General ex rel. Pettee v. Stevens, Saxton (N. J. Eq.) 369, the relator sought to enjoin the Camden and Amboy R. R. and Transportation Co. and others acting under its authority from erecting a bridge over a navigable stream. The claim was that the act authorizing the corporation had been perverted and disregarded, and that there was no legal incorporation. The relators were in no manner estopped to attack the corporate existence of the respondent. The court held:

"Where a set of men claiming to be a legally incorporated company under an act of the legislature, have done everything necessary to constitute them a corporation, colorably at least, if not legally, and are exercising all the powers and functions of a corporation; they are a corporation, de facto, if not de jure; and this court will not interfere, in an incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers."

The chancellor, speaking for the court, said:

"Here, then, is a set of men claiming to be a legally incorporated company under the act of the legislature, exercising all the powers and functions of a corporation. They are a corporation de facto, if not de jure. Every thing necessary to constitute them a corporation has been done, colorably at least, if not legally; and I do not feel at liberty, in this incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers. It has been seen

that the court will not do this where a corporation properly organized has plainly forfeited its privileges; and there is but little difference in principle between the two cases. In both the corporation is actually in existence, but whether legally and rightfully so is the question. And it appears to me that if the court can take cognizance of the matter in this case, it must in all others where it can be brought up, not only directly, but incidentally."

This case is approved and followed in National Docks R. Co. v. Central R. R. Co., 32 N. J. Eq. 755, which held: "When a corporation exists de facto, the court of chancery can not, at the instance of private parties, restrain its operations upon the ground that its organization is not de jure. In such case the proper remedy is by quo warranto, or information in the nature thereof, instituted by the attorney-general." The rule of estoppel found no place in this case.

In S. & L. G. R. Co. v. S. & C. R. R. Co., 45 Cal. 680, it was held that: "If a corporation de facto is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere trespasser can not justify his entry thereon on the ground that it was only a corporation de facto, and was not de jure entitled to the franchise."

In Williams v. Kokomo B. & L. Ass'n., 89 Ind. 339, one Leach gave to an acting corporation his mortgage on real estate. Subsequent to the execution and recording of it, he executed another mortgage on the same land to Williamson. In a proceeding to foreclose the junior mortgage, Williamson maintained that the pretended corporation had no legal existence, by reason of defects and omissions in the proceedings to incorporate, and that the senior mortgage was void. He was in no manner estopped, by dealings with, or recognition of, the first mortgagee to deny its corporate existence. The court held that: "A junior mortgagee can not defeat a senior mortgage by showing that the corporation to which the senior mortgage was executed was defectively organized, if it be a corporation de facto." Elliot, J., said: "Where persons assume to incorporate under the laws of the state, and in part comply with their requirements, assume corporate functions and transact business as a corporation, private persons can not collaterally question the right of such an association to a corporate existence. although there has not been a full compliance with the provisions of the statute. Baker v. Neff, 73 Ind. 68. This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application." It is not easy to distinguish the principle of this case from that of the case at bar.

In Pape v. Capitol Bank, 20 Kan. 440, Pape and wife gave their notes to "James M. Spencer or beaver," and their mortgage on real estate to secure them. Spencer transferred the notes to the Capital Bank of Topeka, an acting corporation, with this indorsement: "Pay the bearer, without recourse on me; James M. Spencer." The mortgage was also transferred to the bank, which proceeded by suit to col-

lect the notes and foreclose the mortgage. Pape and wife interposed the defense that the bank was not, and never had been, a body corporate, by reason, among others, of a defective organization. The bank had assumed corporate functions after an attempt, in good faith, to incorporate, and for a number of years was in the actual and notorious exercise of corporate franchises. Pape had transacted banking business with the plaintiff prior to the purchase of the notes and mortgage, but such business was wholly unconnected with the notes and mortgage in suit. His wife, however, had not in any manner recognized the existence of the bank as a corporate body, and the doctrine of estoppel was not invoked to aid the court in sustaining a judgment of foreclosure against Pape and wife. Brewer, J., says: "The corporation is one de facto; and only the state can inquire, and that, in a direct proceeding, whether it be one de jure. . . . There must, in such cases, be a law under which the incorporation can be had; there must, also, be an attempt, in good faith, on the part of the corporators, to incorporate under such law; and when, after this, there has been for a series of years an actual, open, and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuser after the incorporation, are subjects of inquiry in such an action. (This is not upon the ground of equitable estoppel but upon grounds of public policy. If the state, which alone can grant the authority to incorporate, remains silent during the open and notorious assertion and exercise of corporate powers, an individual will not, unless there be some powerful equity on his side, be permitted to raise the inquiry."

In Thompson v. Candor, 60 Ill. 244, Willetts, in February, 1858, deeded to "Mercer Collegiate Institute," a body pretending to be a corporation, the tract of land in controversy. He died in March, 1858. In 1868 his heirs quit-claimed their interest in the land to Thompson, who filed a bill in chancery for the cancellation of the deed from Willetts to the "Institute," alleging, as one of the grounds of relief, that the named grantee was not legally incorporated — had no capacity to take the title, and that the deed was void. The court held:

"Where parties endeavor to organize a corporation for educational purposes, under the general law, adopt a name, elect trustees, and organize by electing a president and officers, and the trustees had acted for years in managing the property, had leased and mortgaged it, and expended a large sum of money in its improvement, these acts constitute it a corporate body de facto, and the regularity of its organization can not be questioned collaterally. Such irregularity can only be questioned by quo warranto or scire facias."

Thornton, J., says: "In 1856 an attempt was made to organize a corporation under the general incorporation law. A corporate name was selected, trustees were appointed, and an organization effected by

the election of a president and proper officers. The trustees thus appointed acted for years in the general management of the property, leased and mortgaged it, and expended a large amount of money. Here then was a corporate body de facto, which had been engaged in an undertaking involving important interests. The regularity of its organization can not be questioned collaterally. Any alleged non-compliance with the law can only be inquired into by the writ of quo warranto or scire facias."

There is no suggestion throughout the entire case of the rule of estoppel as an element affecting its disposition.

In Paper Works v. Willett, 1 Robertson (N. Y. Sup.), 131, it is held that formal defects in proceedings to organize a corporation are not available to defeat an action brought by a corporation for trespass in wrongfully taking property out of its possession.

See also, as illustrating the principle under discussion: Smith v. Sheeley, 12 Wall. 361; Grand Gulf Bank v. Archer, 8 S. & M. 151, 173; Dunning v. R. R. Co. 2 Carter (Ind.), 437; Dannebroge Mining Co. v. Allment, 26 Cal. 286; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; Mitchell v. Deeds, 49 Ill. 416; Eliz. Academy v. Lindsey, 6 Ired. 476; Darst v. Gale, 83 Ill. 136; Rondell v. Fay, 32 Cal. 354; De Witt v. Hastings, 40 N. Y. (Superior Court) 463; Rice v. R. R. Co., 21 Ill. 93; Douglas County v. Bolles, 94 U. S. 104; The Banks v. Poitiaux, 3 Randolph (Va.), 136; Goundie v. Northampton Water Co., 7 Pa. St. 233; Baker v. Backus, 32 Ill. 79; Tarbell v. Page, 24 Ill. 46; Thornburgh v. R. R. Co., 14 Ind. 499; Tar River Nav. Co. v. Neal, 3 Hawks, 520; Bear Camp River Co. v. Woodman, 2 Me. 404.

In Jones v. Dana, 24 Barb. 395, it was held that if a company has in form a charter authorizing it to act as a body corporate, and is in fact in the exercise of corporate powers at the time of taking a note from an individual, it is, as to him and all third persons, a corporation de facto, and the validity of its corporate existence can only be tested by proceedings on behalf of the people.

In the case at bar, the certificate which was last filed by the society embraced a full statement of the objects of incorporation and indicated what the nature of its business must necessarily be, and was strongly suggestive of the manner in which it must necessarily be transacted; and while it is not our purpose to call in question the action of this court in the quo warranto proceedings, we have no hesitation in saying that if we were now called upon to determine whether the corporate life of Society Perun should be taken, the question, upon the facts offered in proof at the trial below, would not be free from doubt and difficulty. It is very clear that the proceedings to incorporate were colorable; and so far as this fact is a test of the existence of a corporation de facto, it is most amply established. That there was proof of user is manifest from the evidence which was received without objection.

That the judgment of ouster did not and could not have a retroactive

effect upon the rights of the society, and of parties who had dealt with it during its *de facto* existence, is suggested by the opinion of Wright, J., in *Gaff* v. *Flesher*, 33 Ohio St. 115.

The evidence which was offered and excluded would, if credited, have shown Society Perun capable of holding and transferring the legal title to the lands in controversy. Walsh v. Barton, 24 Ohio St. 43; Darxt v. Gale, 83 Ill. 136; Shewalter v. Pirner, 55 Mo. 218; Nat. Bank v. Matthews, 98 U. S. 628; Goundie v. Northampton Water Co., 7 Penn. St. 233; Barrow v. Nashville Turn. Co., 9 Humph. 304; Kelly v. People's Trans. Co., 3 Ore. 189; Bogardus v. Trinity Church, 4 Sandf. Ch. 758.

The public and all persons dealing with this society were justified in assuming that the certificate filed with the secretary of state, and by him admitted to record in his office, had been approved by him, and also by the attorney-general, as required by statute (69 Ohio L. 150), and that it so far conformed to all legal requirements that, as provided in section 2 of the act of incorporation (69 Ohio L. 83), "a copy, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such association."

It would seem that such approval, record, and certificate, followed by uninterrupted and unchallenged user for nearly six years, of all of which proof was tendered, would constitute a corporation de facto, if such a body is, under any circumstances, entitled to legal recognition.

The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity, and all of its transactions void.

The principle of the above cases is to be distinguished from a case where a mere corporation $de\ facto$ attempts to assert the power of eminent domain by the appropriation of private property to public use. It has been held that the exercise of this right (which is but a delegation of the sovereign power of the state), depends upon the sufficiency and legal validity of the certificate of incorporation and public record of its organization. R. R. Co. v. Sullivant, 5 Ohio St. 276; Atkinson v. R. R. Co., 15 Ohio St. 21.

The case of Raccoon River Nav. Co. v. Eagle, 29 Ohio St. 238, is relied upon by the defendant in error. It was an action to recover upon a stock subscription. A plea of nul tiel corporation was interposed. The plaintiff claimed to be organized under an act to authorize the incorporation of companies "for the purpose of improving any stream of water . . . declared navigable by any law of the state of Ohio." On the trial the plaintiff offered in evidence a certificate by which it appeared that the company was formed for the purpose of improving, etc., Big Raccoon river. Unfortunately there was no navigable stream in Ohio by that name. No other testimony was offered. There was no proof of user. There was no defect in the form of the proceedings to incorporate, but an attempt to organize and incorporate for a purpose impossible of accomplishment. There was

neither a de jure nor de facto corporation. Judgment was properly rendered for defendant.

In excluding proof of what was actually done looking to the incorporation of Society Perun, and of the subsequent acts of user, which was offered in evidence, there was error, for which the judgment in the first entitled case (as well as that in the same plaintiff against Hay et al., which was tried with it and involves the same general questions) are reversed. Numerous other questions are presented by the voluminous records in these cases, but as they all depend upon the one central and controlling question discussed above, and as the disposition here made of the cases must lead to a re-trial in the light of the principles indicated in this opinion, they are not separately considered.

Judgment reversed.

BRADLEY ET ALS. v. REPPELL.

October Term, 1895. Supreme Court of Missouri, Division No. 1.1

BRACE, P. J. This is an action in ejectment in common form to recover the possession of certain lands described in the petition, situate in Kansas City; instituted in the Circuit Court of Jackson County, taken thence by change of venue, and tried, in the Circuit Court of Clay County.

The answer was a general denial, and a plea of the statute of limitations as to a part of the land, and no claim as to the remainder. Issue

was joined by reply.

On the trial, at the close of the plaintiff's evidence, the court sustained a demurrer to the evidence as to the plaintiff T. C. Bradley, and overruled it as to the other plaintiffs, Samuel F. Freeman and the Atlas Investment Company. The trial then proceeded, and after all the evidence was heard, the issue was submitted to the jury, who returned a verdict for the defendant. Thereupon plaintiffs filed motions for new trial and in arrest of judgment. The motion for new trial coming on to be heard, was sustained and the verdict set aside on the following grounds, "specified of record."

"9th. Because the Court erred in refusing to admit as evidence a certified copy of the Warranty Deed dated August 20, 1880, from the West Kansas City Land Company to Charles W. Whitehead, which certified copy was offered in evidence by plaintiff.

16th. Because the Court erred in refusing to admit as evidence the certified copy of the Quit Claim Deed from the West Kansas City Land Company to Charles W. Whitehead, which is offered in evidence by the plaintiff."

From the order sustaining this motion and setting aside the verdict, the defendant appeals.

(1). By a Special Act of the Legislature approved March 14, 1859

¹ From copy of opinion furnished by Clerk of Supreme Court.

(Sess. Acts, 1858, p. 292), The West Kansas City Land Company was incorporated with power "to make contracts, sue and be sued," and to "purchase and hold any quantity of land in Kaw township in Jackson County, Missouri, not exceeding one thousand acres; to lay the same off into parks, squares, and lots, improve, sell or convey the same by deed; to re-purchase and re-convey any portion of the same, when necessary in transacting the legitimate business of said company; and purchase and hold any personal property necessary for the purposes above indicated." Nothing was said in the act either directly or indirectly as to the duration of the company's corporate existence. By the general law in force at the time this company was thus incorporated it was provided that "Every corporation, as such, has power, to have succession by its corporate name for the period limited in its charter and when no period is limited, for twenty years." R. S. 1855, Vol. 1, p. 369. Sec. 1. "And that upon the dissolution of any corporation, the president and directors or managers of the affairs of the corporation at the same time of the dissolution shall be trustees of such corporation with full power to settle its affairs." R. S. 1855. Vol. 1, p. 375, Cap. 34, Sec. 24. The corporation thus chartered was an ordinary business corporation whose corporate existence by virtue of these statutory provisions expired on the 14th of March, 1879, State ex rel. vs. Payne, 29 Mo. 468, and the two deeds rejected by the court upon the trial were executed after that date in the name and under the corporate seal of the company "by William McCoy, President." "Attest: Edw. A. Allen, Secretary.") The defendant objected to the introduction of these deeds offered in evidence by the plaintiffs as constituting a part of their chain of title, and in support of his objections read in evidence the Act of the Legislature aforesaid incorporating said company, and it was admitted that said company in whose behalf said deeds had been so executed, was the same company by said act, incorporated, and that it was never thereafter re-incorporated. The defendant's claim of title was by adverse possession, and there is not in the case any question of estoppel to deny the existence of the corporation by reason of the relation sustained by the defendant to the land company, or of any dealings by him directly or indirectly with it, or any person connected with, or representing it. Why then should the defendant be precluded from showing, by the law that gave that company its corporate existence, that, at the time these deeds were made, it was dead, incapable of executing a legal conveyance of the real estate in question, and that said deeds were therefore void, and no evidence of title? The answer returned by the counsel for plaintiffs to this question is, "That it is the settled law of this State that a conveyance to, or by a corporation de facto can be assailed on the ground of lack of corporate existence only by the State."

This answer does not meet the question, unless it be assumed that a corporation whose corporate existence has expired by the terms of the law which created it, still exists as a defacto corporation as to all per-

sons except the State, an assumption that we think is not sustained by the authorities cited, and is not "the settled law in this State." On the contrary, in this State, as elsewhere unless otherwise provided by statute, the law is, that where the term of the existence of a corporation is fixed by its charter or the general law, upon the expiration of that term, the corporation becomes ipso facto dissolved; it can no longer act in a corporate capacity, and its title to property ceases. 2 Beach on Private Cor. Sec. 780; 2 Morawetz, Sec. 1031. In such an event in this State the title to its property is by statute devolved upon trustees for the settlement of its affairs and the distribution of its assets. R. S. 1855 supra, R. S. 1889, Sec. 2513; and thereafter it has no power to make a legal contract or convey property in its corporate name and capacity. It ceases to be a corporation, de jure et de facto, for the reason that there is no law in force authorizing its existence, and no law by virtue of which it might exist, and no person unless estopped by his own action, ought to be, or can be precluded from showing this fact, apparent on the face of the law itself, without the necessity of any judicial investigation; in an issue involving his own personal rights and interests.

An examination of the authorities cited by counsel for respondents, and of all the other cases touching this question, will show that it has never been otherwise ruled in this State, nor elsewhere so far as we have been able to discover.

The first case cited by counsel for respondent McIndoe vs. St. Louis, 10 Mo. 576, does not touch the question, side, edge, or bottom

The cases of Chambers v. St. Louis, 29 Mo. 543; Land v. Coffman, 50 Mo. 243; Shewalter v. Pirner, 55 Mo. 218; and Conn. Mutual Life Ins. Co. vs. Smith, 117 Mo. 26; go no farther in the direction of our present inquiry than to hold that where an existing corporation has power to acquire, hold and dispose of land the question whether such corporation has transcended the limits of such power in respect thereto can only be raised and determined in a direct proceeding by the State against the corporation. But this falls far short of the question here; which goes to the fact of the existence of the corporation, conceded in these cases.

It is also well settled law that one who has contracted with an organization as a corporation, in its corporate name, is estopped from denying the existence of such corporation at the time of making the contract, or of alleging any defect in its organization affecting its capacity to contract or sue as a corporation upon such contract. 4 Thomp. Corp. 5275; 4 Am. & Eng. Encycl. of law, p. 198 and cases cited note 1, p. 199; 2 Morawetz Priv. Corp. Sec. 750, 753; Beach on Corp., Sec. 13. And so it has been ruled in this state in many cases, including those next cited in the brief of counsel for respondent. Ohio & M. R. R. Co. vs. McPherson, 35 Mo. 13; Farmers & Merchants Ins. Co. v. Needles, 52 Mo. 18; City of St. Louis v. Shield, 62 Mo. 247; Stoutimore vs. Clark, 70 Mo. 471; Studebaker Bros. v.

Montgomery, 74 Mo. 101; St. Louis Gas Light Co. v. City of St. Louis, 84 Mo. 302, affirming 11 Mo. App. 55; Broadwell v. Merritt, 87 Mo. 95; Grandy Mining Co. vs. Richards, 95 Mo. 106. Of course such estoppel extends as well to the *privies* of; as to the parties to such contracts. Hasenritter v. Hirchhoffer, 79 Mo. 239; Ragan v. Mc-Elroy, 98 Mo. 349; Broadwell v. Merritt, 87 Mo. 95; Reinhard v. Va. Lead Mining Co. 107 Mo. 616. The rulings in none of these cases, however, support the contention that the deeds should have been admitted in evidence in the case in hand, in which, as has been already seen, there is no question of estoppel.

Nor do the cases of Finch v. Ullman, 105 Mo. 255, or Crenshaw v. Ullman, 113 Mo. 633, cited by plaintiff's counsel; in which it was ruled where there was a law authorizing the existence of a corporation, at the time when the organization assumed to act, and did act as such corporation, — that its corporate existence as to such act could not be called in question in a collateral proceeding; sustain respondent's contention. It is true in these and other cases, it is sometimes broadly stated as settled law, in substance, "that a transfer of property to or by a corporation de facto will be binding and valid as against all parties except the state," but this is simply a restatement in another form of the proposition ruled. It implies that the case is one in which a corporation may by law exist, for there can be no corporation de facto when there cannot be a corporation de jure. 1 Beach on Priv. Corp. Sec. 13; 4 Thomp. Corp. Sec. 523-5275; at least as to any person who is not precluded by his own action, or that of those under whom he claims, from questioning its existence. Whatever may be the rule as to these, as to all other persons, there must be at least color of law for its corporate existence to preclude such inquiry, and it would seem to go without saying, that a law which gives existence to a corporation for a certain number of years at the end of which time it must surely die, cannot give color to its corporate existence after the date of its death as decreed by the terms of that same law.

Judge Thompson in his recent work on Private Corporations says: "There is much judicial authority for the proposition that where a corporation is brought to an end by the lapse of time, that is, by the expiration of the distinct limitation of its life in its charter, any further exercise of its corporate powers, may be questioned collaterally. The governing principle here is that upon the expiration of the time limited by the charter for the existence of the corporation its dissolution is complete. 'The dissolution in such case,' it has been said, 'is declared by the act of the Legislature itself.' The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is de facto dead." Thomp. Corp. Sec. 530, citing in support of the text, People v. Manhatten Co., 9 Wend. N. Y. 351; Morgan v. Lawrenceburg Ins. Co., 3 Ind. 285; Wilson v. Tesson, 12 Ind. 285; Grand Rapids Bridge Co. v. Prague, 35 Mich. 400; Dobson v. Simonton, 86 N. C. 492; Sturges v. Vanderbilt, 73 N. Y. 384; Bank of U. S. v. McLaughlin, 2 Cranch C. C. (U. S.) 20. Further on in the same section, however, he

says: "On the other hand it has been ruled in Missouri, that the question whether the charter of a corporation has expired by limitation of time, can be adjudicated only in a direct proceeding by the State, that such a defense cannot be set up collaterally in an action by the corporation,"—citing the single case of St. Louis Gas Light Co. v. City of St. Louis, 84 Mo. 202, affirming 11 Mo. App. 55.

In Sturges v. Vanderbilt, supra, decided in 1878, RAPALLO J. said: "It is further claimed that until a corporation is declared dissolved by Judicial decree, creditors may proceed against it by its corporate name, and that it remains in esse until formally adjudged dissolved. All the cases cited in support of this proposition relate to a dissolution in consequence of insolvency, or non user, or mis-user of the corporate franchises, or some other cause of forfeiture. In such cases it is well settled that the dissolution does not take effect until judicially declared. But the principle upon which that class of cases rests, is not applicable to a dissolution by expiration of the charter. The dissolution in such case is declared by the act of the Legislature itself. The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is de facto dead. People v. Walker, 17 N. Y. 503; Greely v. Smith, 3 Story C. C. R. 658. Where the charter of a corporation is annulled by act of the legislature the corporation is extinct and no judgment can be rendered against it (Mumma v. Potomac Co., 8 Pet. 286; Merrill v. Suffolk Bank, 31 Me. 57). We have been referred to no authority holding a contrary doctrine."

After a very extended search for, and a careful examination of, the cases, both before and since the date of this decision, we also have been unable to find any authority contrary of this doctrine; unless it can be found in the Gas Light Co. case above cited by Judge Thompson or in Miller v. Coal Co. 81 W. Va. 836 also cited by him, and to these cases our attention will now be directed.

In St. Louis Gas Light Co. v. City of St. Louis, which was an action by a corporation upon a written contract entered into between plaintiff and defendant, the defendant claimed that the plaintiff could not maintain its action thereon, because its corporate life had expired before the making of the contract and the institution of the suit. this claim the court ruled, that, the defendant having by entering into the contract with the plaintiff admitted the capacity of the plaintiff to enter into a binding obligation as a corporation, the defendant was estopped to deny plaintiff's corporate existence, when sued upon a promise contained in such contract. After having by this ruling fully covered the point in issue, Judge Thompson, who delivered the opinion of the court, in the same connection, closed this paragraph of his opinion by adding the following dicta: "Whether or not its charter has expired by limitation is a question which cannot be adjudicated in a collateral proceeding such as this. It can only be raised in a direct proceeding between the state of Missouri and the defendant. City of St. Louis vs. Shields, 62 Mo. 247, 251." The case cited by the learned judge was one in which it was sought to draw in question the constitutionality of an act incorporating the plaintiff, in which the court held that the act was constitutional, and further that the defendant having

entered into the contract with the city admitted its corporate capacity and was estopped from denying it in an action upon such contract. While the latter ruling supports the ruling in the case in which it is cited by Judge Thompson, and is in harmony with all the cases, it does not support his dicta therein, that the question whether the charter of the corporation has expired by limitation "can only be raised in a direct proceeding between the State of Missouri and the defendant." The dicta being, then, obiter, to the case then in hand, and unsupported by the case cited for it, is not to be regarded as authority. In the case of Miller v. Coal Co. 31 West. Va. 836, it was held, under the statute of that state, providing, in effect, that when a corporation shall expire or be dissolved, suits may be brought, continued or defended, property conveyed, and all lawful acts be done in the corporate name in the sike manner and with like effect as before such dissolution or expiration so far as is necessary to wind up its affairs: That, a corporation continuing in business, and committing a tort after the expiration of the term of its existence, as provided by its charter, was precluded from setting up the expiration of its corporate existence as so provided in an action against it by the person injured by such tort. Here we have a law by which the corporation might exist for certain purposes after its charter term had expired, and a state of facts which precluded the corporation from denying its existence; in other words: law for the existence of the corporation, and an estoppel to deny it. These two elements are alike wanting in the proposition of the dicta of Judge Thompson, and in the facts of the case under consideration, and this West. Va. case, no more than the case of the St. Louis Gas Light Co. v. St. Louis, 11 Mo. 55 (the ruling in which, but not the dicta, was approved in 84 Mo. 202) is authority for his proposition or the respondent's contention in the case in hand.

We are cited by counsel for respondent to one other case, which has not yet been noticed, the case of the Catholic Church v. Tobein, 82 Mo. 418, in which it was held that the plaintiff suing as a corporation acquired no right to property devised to an unincorporated organization of the same name, by a will which took effect before the plaintiff was incorporated.

It cannot be seen how this case can in any way support the respondent's contention. On the contrary the ruling could have been made only upon an inquiry and finding that the alleged corporation was non-existent at the time the will took effect. It was non-existent then because there was no law authorizing its existence. If inquiry could be legitimately made in that case whether there was any law in force authorizing the existence of that corporation, why can not a like inquiry be made in the present case? The defendant was not precluded from making such inquiry by any act of his own, or of any other person under whom he claimed. He did not propose to bring in question the validity of any law, authorizing the existence of the corporation at the time these deeds were made, or the regularity or validity of the corporation organized under such a law, or the validity

of any of the acts of such corporation to determine which would require judicial investigation; but simply to show by the law which once had given corporate existence to the West Kansas City Land Company that, at the time these deeds purport to have been executed, that corporation had ceased to exist, and could not have executed them. Upon no principle of law with which we are familiar can he be precluded from so doing, and we think no well-considered case can be found, that properly understood, gives support to a ruling to that effect. We have been speaking of the law of the company's existence as a unit, for we fail to discover how the fact that the limit of the term of existence, being contained in the general law, and not in the special Act, can in any way affect the principle we have been discussing. The general law became a part of the charter of the company at the moment of its creation, and must be read into it, the same as if it had been written therein. It follows from what has been said that the trial court committed [no] error in rejecting the deeds aforesaid when offered in evidence by the plaintiffs, and that it did commit error in setting aside the verdict for defendant, and granting a new trial on the ground that it did commit error in refusing to admit said deeds in evidence.

We can review cases only upon the record made by the trial court, authenticated to us in the manner provided by law, and having thus reviewed this case and found that the trial court committed error in setting aside the verdict and granting a new trial for the reasons specified of record, and no other ground for such action appearing upon the record thereof before us, the same is reversed and set aside and the cause will be remanded to the circuit court with directions to enter up judgment in accordance with the verdict. All concur.

PER CURIAM: The foregoing opinion handed down in Division No. 1, is adopted as the opinion of the Court in Banc. Gantt, Sherwood, Macfarlane, and Burgess, JJ., concurring with Brace, C. J., therein. Barclay and Robinson, JJ., dissenting. Judgment will therefore be entered as directed in the opinion.

SLOCUM v. PROVIDENCE STEAM AND GAS PIPE CO.

1870. 10 Rhode Island, 112.1

SLOCUM v. WARREN.

1871. 10 Rhode Island, 116.1

Bills in equity, praying that defendants might be enjoined from selling plaintiff's land under executions recovered by them against the American Steam and Gas Pipe Co. The plaintiff was found by the Court to be a stockholder in the latter Company. Chapter 128, Rev. Stat., provides that every manufacturing company shall annually file a certain certificate; and that, if any of said companies shall fail so to do, all the stockholders of said company shall be jointly and severally liable for all the debts of the company then existing. It appeared that one, at least, of the creditors, Elizabeth Warren, made a loan to the Company, relying for repayment not only upon the credit of the Company, but also upon the personal liability of the stockholders, and of the plaintiff especially as one of them. Plaintiff contends that he is not subject to any such liability, for the reason that the American Steam and Gas Pipe Company never had any legal existence as a corporation.

Bradley and John Eddy, for plaintiff.

B. N. & S. S. Lapham, James Tillinghast and Cobb, for defendants. DURFEE, J. [in Slocum v. Providence &c. Co.]. . . . The charter, or act of incorporation, for the American Steam and Gas Pipe Company, was granted or passed in 1867, the capital named in the charter or act being seventy-five thousand dollars. At that time, there was in force in the state a public statute which provided that no act of incorporation granted after the passage thereof, "for any other than for religious, literary, charitable, or cemetery purposes, or for a military or fire company, shall take effect until the persons therein incorporated shall have paid to the general treasurer the sum of one hundred dollars, if the capital limited by such act of incorporation is the sum or any less sum than one hundred thousand dollars." The hundred dollars, required by this statute, was not paid for the American Steam and Gas Pipe Company, and consequently, their act of incorporation never went into effect, if it is to be construed as passed subject to the statute. We think it is to be so construed, there being no clause of the act excepting it out of the operation of the statute. See The Union Horse Shoe Works v. Lewis, 1 Abbott U.S. 518.

The defendants contend that, even if the act has never gone into effect, the existence of the company as a corporation cannot be questioned in a collateral proceeding. It is undoubtedly the rule that, if a charter has once been duly granted and accepted, the state alone can

¹ Statement abridged. Only portions of the opinions are given. - D.

enforce a forfeiture of the charter for any violation thereof, or failure to comply with its considerations on the part of the corporation; and that, until the state sees fit to enforce the forfeiture, the corporation is to be recognized as legally existing in all collateral proceedings. But here, the act of incorporation being inoperative, there never was any corporation to incur a forfeiture, or any charter to be forfeited. We know of no rule which precludes inquiry into the question, whether a company which assumes to act as a corporation has ever been incorporated, in any case, in the absence of any matter of estoppel to prevent the inquiry.

But the plaintiff, in order to have the relief which he seeks, ought to satisfy us, not only that his company is not a corporation, but also that he is entitled to show the fact as against its creditors. We assume, as we think the bills warrant us in assuming, that the plaintiff is a stockholder in the American Steam and Gas Pipe Company, though he has done nothing as such, except hold his stock. The question then is, whether a stockholder, who does nothing but hold his stock, is estopped, when pursued by a creditor of the supposed corporation, from denying its existence. We think he is so estopped. By becoming and continuing a stockholder, he holds himself out as a corporator, and so contributes to the belief that the company with which he is associated is a corporation.) To permit a person who has so held himself out to say that he is not a corporator, when legally pursued as such, would be to permit him to take advantage of his own wrong. He is like a person who, having held himself out or suffered himself to be held out as a copartner, may be charged with the copartnership debts. Or he is like a person who, without authority, as executor or administrator, intermeddles with the property of a decedent, and so becomes chargeable as an executor in his own wrong. The plaintiff having assumed the character of a corporator, where he is sought to be charged as such, ought not to be heard to say that the character was falsely or unlawfully assumed. (The fact that he was not active in the business of the company cannot avail him); for it is the assumption to hold the stock as if he were a corporator, which makes the mischief. It might easily happen that the stockholder, whose name contributed most to the credit of the supposed corporation, was least active in its business, and it would be plainly unjust to exempt him from liability to the creditors, merely because of his inactivity.

We are aware that in *Utley* v. *Union Tool Company*, 11 Gray, 139, the Supreme Court of Massachusetts exempted a stockholder from liability to a creditor of a supposed corporation, upon proof that the corporation had never legally come into being under the statute of that state But it does not appear that in that case the question of estoppel was raised by the counsel or considered by the court. We should agree entirely with the Supreme Court of Massachusetts in their decision in any case in which the estoppel would be inapplicable.

Durffee, J. [in Slocum v. Warren]... We decided in the former case that having, by becoming a stockholder, helped to hold the company out as a corporation, he could not be permitted to say, when pursued by a creditor of the company, that he and his associates or predecessors had omitted to do an act which they ought to have done before organizing as a corporation, and that in consequence of this delinquency the company was not (what it purported to be) a legally established corporation. The plaintiff maintains that this decision was erroneous, and in support of his view, relies especially upon the cases of Hudson v. Carman, 41 Maine, 84; Unity Insurance Company v. Cram, 43 N. H. 636; Utley v. Union Tool Company, 11 Gray, 139; and Gardner v. Post et al. 43 Pa. St. 19. We propose to consider these and some of the other cases bearing upon the question, somewhat in detail.

[After commenting on various authorities, the opinion proceeds.] The plaintiff also cites cases in which it has been held that a corporation duly established as such is not estopped from denying its liability where there is a want of power to contract the liability, the reason being, he says, that otherwise the powers of the corporation might be indefinitely enlarged; and he argues that, in the case at bar, the doctrine of estoppel is still less applicable, inasmuch as the company was acting not merely in excess of its corporate powers, but without any corporate power whatever. But in the case at bar, the defect of power exists not by reason of any insufficiency of the grant, but by reason solely of a delinquency on the part of the grantees of the power; and the estoppel, if applied, would be applied not to prevent an appeal to the charter to show a want of authority, but to prevent the introduction of evidence by the company or its members to prove their own delinquency. We do not think that in such a case there should be any hesitation to apply the doctrine of estoppel from fear that it would lead to an indefinite enlargement of the powers of the corporation. And see Bargate v. Shortridge, 5 H. L. Cas. 297, 318; Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Company et al. 23 How. U. S.

[After citing and commenting upon other authorities, the opinion proceeds.]

It is true these cases are not precisely like the case at bar, but they are cases which illustrate the application of the law of estoppel in respect to corporations, or companies acting as corporations, or which illustrate to what extent the corporate existence of a company acting as a corporation can be collaterally questioned. And we think it is safe to say upon the authority of these cases, that at least where there is an act or charter in existence, under which a company by taking the proper steps can become a corporation, if a company does de facto organize and hold itself out as a corporation, contracting obligations as such, it cannot, when sued upon such obligations, by persons who have dealt with it as such in good faith, be permitted to avoid a corporate

liability thereon, by setting up that it has not taken all the steps prescribed as conditions precedent to its legal existence as a corporation. If this be so in regard to the company as a whole, we do not see why it is not equally so in regard to each member of the company individually, in so far as membership imports an individual liability. In this case, it is said there was no act or charter; but in our opinion there was a charter duly granted by the legislature, subject only to a condition that it should not take effect until a certain act should be performed; but inasmuch as this act could have been performed, as it ought to have been performed, by the grantees of the charter before their organization as a corporation, the case does not, in our view, substantially differ from cases which are clearly within the rule above stated. Indeed it is frequently the case that a charter is granted subject to an implied condition, that the grant shall not take effect until it has been duly accepted; and yet, as we have seen, the doctrine of estoppel may be applied to prevent the want of such an acceptance from operating to defeat a just claim. Camp v. Byrne, supra; and see Tobacco Pipe Makers' Co. v. Woodroffe, 8 D. & R. 30, cited in Abbott's Dig. Law of Corp. p. 331, § 23. In this case the company had only to pay into the treasury of the state one hundred dollars, and all would have been right. When it organized as a corporation, and from year to year continued doing business as such, it as much as said, and each one of the stockholders as much as said, that that sum had been paid; and now neither the company nor any one of the stockholders ought to be heard to assert the contrary in order to escape any liability to which he or it would have been subject if the payment had been duly made.

This decision is doubtless a hard decision for the plaintiff, and we very much regret that his situation is such that he is so severely affected by it. But hard as the decision is for the plaintiff, it only subjects him to the liability to which he would have been subjected if the tax due the state had been paid, as it ought to have been paid, and therefore only to the liability which, as an honest man, he must be presumed to have intended to incur when he connected himself with the company.

[Plaintiff's prayer denied.]

¹ The statute under consideration in the above case was repealed by the Rhode Island General Statutes of 1872; and the following provision substituted: "No corporation shall be organized under a charter, until the petitioners... shall pay into the general treasury for the use of the State, one hundred dollars." In Hughesdale Mfg. Co. v. Vanner, 12 R. I. 491 (an action of assumpsit by the corporation), it was held, that, under the later statute, the failure to make the payment would be taken advantage of only by the State, and did not avail the defendant as a valid objection to the plaintiff's corporate existence. The Court said, that the payment prescribed by the later statute was not, like that prescribed by the earlier statute, a condition precedent to the existence of the corporation; but something required to be after the charter has gone into effect, and, if the charter is in the usual form, after the corporation has been created. — Ed.

NARRAGANSETT BANK v. ATLANTIC SILK CO.

1841. 3 Metcalf, 287.1

Shaw, C. J. The first of these cases was assumpsit on a bill of exchange, drawn on the company at four months' date, and accepted by Samuel B. Tuck, treasurer. This company was incorporated as a manufacturing corporation by St. 1836, c. 108. The defendants contended, that in order to recover against the defendant corporation it was incumbent on the plaintiffs to prove that the company had complied with the provisions of the Rev. Sts. c. 38, §§ 4, 9, and c. 44, § 3, regulating the organization of manufacturing corporations. These provisions require them to choose a clerk and treasurer; that the clerk shall be sworn, and shall keep a record of votes; that the capital stock shall be divided into shares; that the first meeting shall be called by a prescribed form of notice, &c. The court are of opinion, that this argument of the defendants proceeds upon an erroneous view of the law; especially in cases, where a party, who is a stranger, and not presumed to have access to the books, and to have notice of the proceedings of a corporation, is proceeding to recover against a company acting as a corporation) Many of the requisitions of the statutes referred to are directory to the corporation, its officers and members, and are not conditions precedent to the existence and capacity of the corporation to contract.

But were it necessary to prove the regular organization of the corporation, the objection would come with an ill grace from the defendants, and under the circumstances must be deemed untenable. It is the duty of such corporations to keep records; the primary and only regular evidence of their organization is legally presumed to be in their records and the defendants decline producing those records, on notice, without assigning any reason. The maxim of law is, that all things shall be presumed to have been rightly and correctly done, until the contrary is proved. This maxim is stated and explained, and many instances given of its application to corporations, and to acts and doings of their members, officers and agents, in Bank of U. States v. Dandridge, 12 Wheat. 70. As the corporation could not proceed lawfully, until duly organized, and as they did proceed to act as a corporation, this presumption has its effect. The defendants have the records, which prove such organization, if it took place, and withhold them. This maxim under these circumstances, would go far to establish the actual and regular organization of the defendant corporation.

But the court are of opinion, that in an action against a corporation, it is not incumbent on the plaintiff to prove that the defendants have complied with the requisitions of the statutes, where they are not in

¹ Statement, and part of opinion, omitted. — ED.

terms, or by necessary or reasonable implication, conditions precedent to their existence, or capacity to do particular acts. It has been held that the existence of a corporation, and of course its organization, may be proved by reputation, and by its actual use, for a length of time, of the powers and privileges of a corporation. Dillingham v. Snow, 5 Mass. 547. Stockbridge v. West Stockbridge, 12 Mass. 400. In recent to manufacturing corporations, which are of more recent origin in this Commonwealth, it is in general sufficient to give in evidence the act of incorporation duly authenticated, and the actual use of the powers and privileges of an incorporated company, under the name designated in the act of incorporation. Bank of U. States v. Dandridge, 12 Wheat. 64. Utica Ins. Co. v. Tillman, 1 Wend. 555. Utica Ins. Co. v. Cadwell, 3 Wend. 296. Fire Department of New York v. Kip, 10 Wend. 266. These were cases in which the corporation, whose organization was in question, were plaintiffs. The rule applies à fortiori to the case of a plaintiff seeking to enforce an obligation against a corporation.

And we think it highly necessary to the purposes of justice, that the law should be so held; otherwise a company might avail themselves of the powers and privileges of a corporation, without subjecting themselves to its duties and obligations, and might set up their own neglect of duty, or wilful non-compliance with the requisitions of law, to discharge themselves of such obligations. Nor would this be the whole extent of the wrong done by such construction, in regard to manufacturing corporations. It has been the policy of this Commonwealth to give a qualified remedy against the individual members of manufacturing corporations, as collateral security to their debts and obligations. But any construction, which would destroy or impair the obligation of the corporation, would, to the same extent, take from creditors their remedy against the members.

As to the evidence in regard to the fact of acting as a corporation, it is stated hereafter in reference to the other case.²

Judgment on the verdict for plaintiff.

Acts of incorporation are now deemed public acts; Rev. Sts. c. 2, § 3; and printed copies of them, published under the authority of the government, are to be admitted as sufficient evidence thereof, in all courts of law, &c. Rev. Sts. c. 94, § 58.

² [In the opinion in the case of *Westcott* v. *Atlantic Silk Co.*, heard at the same time, Shaw, C. J., says: "The act of incorporation being shown, there was evidence tending to prove that the company went into operation, established a factory, and erected machinery; . . ."]

JONES v. CINCINNATI TYPE FOUNDRY CO.

1860. 14 Indiana, 89.1

Appeal from the Grant Circuit Court.

Perkins, J. — Suit upon a promissory note.

- "The Cincinnati Type Foundry Company, a corporation," &c., "complains of David W. Jones, defendant," &c., upon a promissory note, of which a copy is set out thus:
 - "\$279. Indianapolis, Indiana, October 11, 1857.
- "Six months after date, I promise to pay to the order of the Cincinnati Type Foundry Company, two hundred and seventy-nine dollars, for value received, without relief from valuation laws.

David W. Jones."

The defendant demurred to the complaint. The demurrer was overruled, and rightly.

The defendant then answered -

- 1. That he was not indebted to the plaintiffs.
- 2. That each and every allegation of the complaint was untrue.
- 3. That the plaintiffs had not a legal capacity to sue, because not a corporation.

Issue. Trial. The note constituted all the evidence. Judgment for the plaintiffs on the note.

The appellant contends that the case was not made out against him, because it was not proved that the appellees were a corporation, and thus possessed of the capacity to sue.

The appellees insist that the note sued on is a contract with them as a corporation, and that their existence is thereby admitted.

As a general proposition, it is the law of this state that a contract with a party as a corporation estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such, Shappel v. Hubbard, at this term.

And it has been held in other states that where individuals are incorporated upon performance of certain acts, a person who contracts with them by their corporate name, cannot, in an action against him on the contract, deny the performance by them of the acts necessary to give them a corporate existence. Hamtranck v. The Bank of Edwardsville, 2 Miss. R. 169.—Tarr River Navigation Co. v. Neal, 3 Hawks, 520. See 1 U. S. Dig., 593; 4 id. 433.

In New York, to work such estoppel, it has been necessary that the contract should state that the party contracted with was a corporation. But this rule does not prevail in other states. It has not been acted upon in this state.

If the style by which a party is contracted with is such as is usual in creating corporations, viz., naming an ideality, but disclosing that of

¹ Part of opinion omitted. — ED.

no individual, as is usual in the cases of simple partnerships, it has been treated as prima facie, at least, indicating a corporate existence. And such seems to have been the rule at common law. Grant on Corp., 62. Probably, a special answer, in such cases, in the nature of a plea in abatement, might, at the proper time, be made available. See Ang. and Ames on Corp., 506, 507, and the numerous cases in our own Reports.

And there is no hardship in this. The party executing the note owes the amount of it. The judgment upon it in the suit merges it, and the payment of the judgment satisfies it, and bars any other action against the maker for the money.

But, in this class of cases, it would seem, after all, that the Courts have proceeded upon a rule of evidence, rather than the strict doctrine of estoppel. They have treated the contract with a party by a name implying a corporation, feally as evidence of the existence of a corporation, more than as an estoppel to disprove such fact. *Grant*, in his late learned work on Corporations, says: "Generally, the fact of an aggregate body being called by a name, is, *prima facie*, evidence that they are incorporated, for the name argues a corporation.' *Norris* v. *Staps*, Hobart, 11. But the Courts take judicial notice that "A. B. and company" is not the name of a corporation. Rex v. Harrison, 8 T. R. 508."

The doctrine of conclusive estoppel seems more properly applied to cases involving the question of legality of organization, where the fact of an existing statute, authorizing, in the given case, such corporation, is known to the Court, either by judicial notice or actual evidence in the cause.

In such cases, where a party has contracted with a body as being organized as a corporation under the law, he will be estopped to dispute the legality of the organization. See the cases cited in the U. S. Dig., and Ang. and Ames, ubi supra.

This doctrine of estoppel, as applied to contracts with corporations, needs further examination; but it is not important in this case, and we shall not here pursue it. The decision of this case will rest upon another ground.

[The learned Judge then takes the position that the general denial in the answer admits the plaintiff's capacity to sue, and that the subsequent paragraph denying plaintiff's capacity is in the nature of a plea in abatement and is inconsistent with such general denial.]

Judgment affirmed.

STOUTIMORE v. CLARK ET ALS.

1879. 70 Missouri, 471.1

APPEAL from Clay Circuit Court.

The action, Stoutimore v. Clark, was brought to establish a certain charge as a lien upon the land formerly the property of Joseph Y. Clark, now deceased; and to obtain a decree for the sale of the land to satisfy the charge. By order of court, the Missouri City Savings Bank, and John Chrisman, were made defendants in said suit. The Bank filed an answer alleging a lien under a judgment against Clark. rendered March 27, 1874. This judgment was founded on a note of said Clark payable to the order of the Missouri City Savings Bank, at the office of said Bank. Chrisman filed an answer alleging a lien on part of the land under a trust deed, executed by Clark Sept. 19, 1874, to secure a loan. Chrisman also filed a cross answer to the answer of the Missouri City Savings Bank, alleging that said Bank was not a corporation. Upon the trial, to prove the corporate organization and existence of the Bank, a certificate signed by the alleged president and secretary was offered in evidence. To the admission of this certificate Chrisman objected, on the ground that it did not comply with the statutory requirements. This objection was sustained, and the evidence was excluded. The Circuit Court ordered the sale of the land; and directed that the judgment of the Bank should be paid out of the proceeds before the claim of Chrisman. Chrisman appealed from an order denying his motion for a new trial.

D. C. Allen, and Samuel Hardwicke, for appellant.

The doctrine of estoppel does not apply. It takes two to make an estoppel. There must be a party estopped, and a party in whose favor the estoppel works. Herman on Estoppel, 40, 41. It is plain from the evidence that the Missouri City Savings Bank never had a corporate existence, nor a lawful organization on which corporate existence could be based. The Circuit Court in excluding the certificate dated April 24th, 1869, so held. Hence there was no person in whose favor an estoppel could work. *Douthitt* v. *Stinson*, 63 Mo. 279. The judgment against Clark being a nullity (because not rendered in favor of any legal entity), no question of estoppel arises under it. Bigelow on Estoppel, 21, 283; *Wixom* v. *Stephens*, 17 Mich. 518.

[Omitting remainder of argument.] Simrall & Sandusky, for respondent.

By the execution of the note Clark admitted the corporate existence of the Missouri City Savings Bank, and he was estopped thereafter from denying its corporate existence. [Omitting citations.] It was unnecessary to allege that plaintiff was a corporation; and therefore

¹ Only so much of the report is given as relates to one point. - Ep.

unnecessary to prove it. Clark was not only estopped by the execution of said note from denying the corporate existence of the bank, but he was also estopped by the judgment. If the defense, nul tiel corporation, was open to him at all, it should have been asserted before the rendition of said judgment.

[Omitting remainder of argument.]

NORTON, J. . . .

In support of these positions it is insisted by counsel that, inasmuch as, on the trial of the cause, the Missouri City Savings Bank failed to introduce evidence establishing the fact that it was a corporation, the said judgment rendered in its favor was a nullity and did not create a lien upon the real estate of Clark.

We think the view thus taken is unsound. The note upon which said judgment was rendered is as follows:

"\$4,000. Missouri City, July 1st, 1870.

Four months after date we promise to pay to the order of the Missouri City Savings Bank, Four Thousand Dollars, negotiable and payable at the office of the Missouri City Savings Bank, Missouri City, Mo., without defalcation or discount, for value received, with interest at ten per cent per annum from maturity until paid.

GILMER, CLARK & Co.

J. Y. CLARK.

R. G. GILMER, Security."

We think it clear that in the suit instituted by the bank on this note Clark would not have been allowed to deny the corporate existence of the bank for the reason that by executing the note he admitted the fact that it was a corporation, which estopped him from disputing it. This principle was distinctly enunciated in the case of National Insurance Co. v. Bowman, 60 Mo. 252, following the case of Farmers and Merchants Insurance Co. v. Needles, 52 Mo. 17, and the case of O. & M. R.R. Co. v. McPherson, 35 Mo. 13. In the case of City of St. Louis v. Shields, et al., 62 Mo. 247, it was expressly held that the obligors on a bond given to a corporation by making and signing the instrument admit the corporate capacity of the obligee, and in a suit on such bond cannot plead nul tiel corporation. The cases cited indisputably establish that Clark, the obligor in the note upon which the judgment rests, could not have set up as a defense that the bank was not a corporation, and it therefore follows that the judgment, so far from being a nullity as counsel contend, was rightful and proper, and from the time of its rendition became a lien on the real estate of Clark in Clay county, and was conclusive and binding not only on him but upon all claiming through or under him.

[After discussing the doctrine of privity.] It thus appearing that Clark, against whom the judgment in favor of the bank was rendered, could not have prevented its rendition by disputing the corporate existence of the bank it therefore necessarily follows from the principles

above announced that Chrisman, the beneficiary in the deed of trust executed subsequently to the rendition of the judgment, and conveying to the trustee for him land upon which said judgment had become a lien, occupied no better position than Clark. The judgment being efficacious to create a lien on Clark's land, could not have been drawn in question by Clark on the ground that it was a nullity, because the bank was not a corporation; nor can it be assailed on the ground by Chrisman, who became a privy in estate by reason of the grant made by Clark to him in the 'deed of trust of part of the land upon which the judgment was attached as a lien.

Judgment affirmed.

CALLENDER v. PAINESVILLE & HUDSON RAILROAD CO.

1860. 11 Ohio State, 516.1

Error to the Court of Common Pleas of Cuyahoga County. Reserved in District Court.

Plaintiffs filed petition to recover debt and damages claimed under a written contract of defendant, an incorporated company, executed on the part of the company by Van R. Humphrey, as its president.

George W. Steele filed a motion to dismiss; stating that he was a member and secretary of the company, denying the validity of the service of the summons, and alleging that said company is not a corporation. The Court of Common Pleas dismissed the action, holding that, in view of the defects in the certificate of organization under the general statute, the defendant was not a duly organized corporation or liable to be sued as such.

SUTLIFF, J. [After considering the question as to the validity of the certificate, and intimating that the only objection to it raised by counsel was untenable.]

But in this case the original petition alleged that the defendant was a corporation. The contract upon which the action was brought, a copy of which was appended to the petition, purported to be executed by the defendant, as a corporation; and the motion and the affidavit of the mover, disclosed, at most, only a defect in the act of incorporation. But the affidavit admits that the company had attempted in all respects to comply with the requisitions of the statute, and in fact obtained, by a supposed compliance on their part, the acceptance and record of their certificate by the secretary of state, a copy of which was to them a valid charter, as they supposed. And the affiant further states that he had acted as their secretary for some three years, and

A Only so much of the case is given as relates to one point. - ED.

that the president of the company was then residing at Painesville,\ where the company then kept its office.

It thus appears that the members of the company obtained their charter, supposed themselves a legally incorporated company, and had continued to hold themselves out, and to act as such, to and with the public, and are still so acting. Nor is there any denial, either in the motion or affidavit of Steele, that their president, Humphrey, was not authorized by himself and others of the association, to execute said contract on behalf of the association, as an incorporated company.

Under such circumstances, the members of the company, and especially the officers of the company, are estopped to deny its existence as a corporation. However mistaken in fact, no person, whether artificial or natural, is permitted to so conduct and represent himself as to induce reasonable men, at his instance, to act upon the truth of such representations in their contracts and dealings with him, and to then deny the truth of such representations, to the prejudice of the party so having relied upon them.

In order for the company, or any member thereof, to so repudiate its conduct, and disprove the truth of its own representation, it is necessary for it, not only to show an honest mistake, but that such mistaken representation had not induced the adversary party, in the exercise of reasonable prudence on his part, to give the credit, make the contract, and act under it in confidence of the truth of such conduct and representations.

But in this case, not only has the association obtained a copy of the certificate, its charter of incorporation, and represented itself to the other party to be a corporation, by making the contract in that capacity, but it has continued to act in a corporate capacity down to the time of filing the motion; and the member so filing the motion states that he is still the officer of the corporation. It thus appears that, instead of contradicting the misrepresentation, before the contract was made, the company had not, even after making the contract, either in conduct or representation, ever denied their corporate character.

Under such circumstances, to suffer the defendants to repudiate their first conduct, and deny the truth of their representations, by which the plaintiffs had been induced to contract with them, and upon which both parties had acted, would be in contravention of those principles of equity upon which the doctrine of estoppel rests, and its operative effect to prevent fraud depends.

We are, therefore, clearly of opinion that, at the time of the hearing of the motion, the company and its members who had so held themselves out to be a corporation, were estopped to deny that fact, for any defect whatsoever, if the same had in fact existed in their charter.

The judgment of the court of common pleas must, therefore, be reversed, and the cause remanded.

Judgment accordingly.

SCOTT, C. J., and PECK, GHOLSON and BRINKERHOFF, JJ., concurred-

BOYCE v. TRUSTEES OF TOWSONTOWN STATION OF THE M. E. CHURCH.

1877. 46 Maryland, 359.1

Assumpsit against an alleged religious corporation. Defendants appeared by counsel, and pleaded, 1st, that the defendants are not and never were a body corporate, as alleged. Plaintiff offered in evidence an agreement or certificate of incorporation under a general statute. The statute required this document to be acknowledged before two Justices of the Peace, or a Judge of the Circuit Court or of the Supreme Bench of Baltimore. It was acknowledged before a single Justice of the Peace. Plaintiff, to show user of the corporate name and franchise, offered in evidence a deed of land to said Trustees; and a mortgage from said Trustees to Crook and Hiss, Trustees.

All the above evidence was rejected, and plaintiff excepted. Verdict and judgment for defendants. Plaintiff appealed.

Wm. A. Fisher and Orville Horwitz, for appellant.

Arthur W. Machen, for appellee.

Stewart, J. . . . But the appellant has undertaken to offer evidence of certain acts and proceedings of the appellee, referred to in the exceptions, to show that it held itself out as a corporation, and treated with the appellant as such, and is estopped from denying its liability as a corporation.

We think it would be extending the doctrine of *estoppel* to an extent, not justified by the principles of public policy, to allow it to operate through the conduct of the parties concerned, to create substantially a *de facto* corporation, with just such powers as the parties may by their acts give to it.

This would be substituting the dealings of the parties, for compliance with the requirements of the law, and giving to them the same effect through the aid of the Courts. Thus, virtually, through the Courts, recognizing the existence of the corporation, in manifest disregard of the written law.

It has been determined by this Court, that a corporation cannot bind itself in excess of its powers. *Penna. Steam Navigation Co. vs. Dandridge*, 8 G. & J., 319.

Whilst denying its capacity upon any principle of estoppel, to make contracts *ultra vires*, to bind itself; it would not be consistent with that theory to recognize its *existence ad libitum*, according to the conduct of the parties concerned.

Such a principle would seem to affix no other limit to the existence of the corporation *de facto*, or the extent of its power than the dealings of the parties, through the recognition of the Courts, might, upon the doctrine of estoppel, prescribe.

¹ Statement abridged. Arguments, and part of opinion, omitted. - ED.

It would be more reasonable to hold corporations to their contracts, though ultra vires, of which they have received the benefit, or to prevent parties who have contracted with them, and received the benefit therefrom, from defeating their liability, on the ground of want of power in the corporation, as is held in quarters of high authority, (see note and references in 2nd Kent, 351,) than to hold that corporations should be deemed to have existence, because they had so held themselves out.

The statute law of the State, expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law, and clearly against its policy, and justified upon no sound principle in the administration of justice.

Judgment affirmed.

CHAPTER V.

ACQUISITION OF MEMBERSHIP—SUBSCRIPTIONS FOR STOCK.¹

THRASHER v. PIKE COUNTY R. CO.

1861. 25 Illinois, 393.2

Breese, J. The appellee, who was plaintiff in the court below, urges several reasons justifying a recovery in this case, which it is necessary to notice. The declaration contains a special count, averring, that on the nineteenth of March, 1856, the plaintiffs were a body politic and corporate, with power to construct and operate a railroad within the county of Pike, and authorized by law, as such corporation, to secure subscriptions to the capital stock of the company to the amount of one million of dollars, in shares of one hundred dollars each, and, desiring to ascertain what amount of stock would be subscribed, and not having opened regular subscription books, but intending so to do, agreed with the defendant that they would, in a reasonable time thereafter, open books for the purpose of securing such subscriptions, and that they would permit and allow the defendant, when the books should be opened, to subscribe to the capital stock of the company thirty shares of one hundred dollars each, and upon payment therefor, the defendant should be the owner of thirty shares of the capital stock of the company. It is then averred, that the defendant, in consideration of this promise, undertook and promised the plaintiff that he would subscribe to the stock of this company the sum of three thousand dollars, when the books should be opened for subscriptions; that this promise was by a writing, signed by the defendant, and by him de-

¹ The effect of fraud in obtaining subscriptions is not dealt with as a specific topic in this book. The general rule of law, that a contract induced by fraudulent representations is voidable at the option of the innocent party, "applies with full force both to contracts of membership and to contracts to purchase or to take shares in a corporation at a future time." But, of course, the right to avoid a subscription induced by fraud may be barred by laches. And, in view of the peculiar character of the contract of membership, "and the equitable relations which it creates as between the shareholders and creditors and between the shareholders themselves," the person defrauded "must proceed with the utmost diligence if he desires to annul his contract." See 1 Morawetz on Private Corporations, 2d ed. ss. 94 and 108.—ED.

² Statement omitted. Only so much of the opinion is given as relates to a single point. — Ep.

livered to the plaintiff. It is then averred, that on the same day, subscription books to the capital stock of the company were opened, of which the defendant had notice. The breach is, that the defendant neglected and refused to subscribe anything to the capital stock, accompanied by an averment that the subscription, when the books were opened, was due and payable before the commencement of the suit, and although notified thereof, the defendant has refused to pay any part of the sum of three thousand dollars. The common counts are added, in one of which the indebtedness is alleged to be for one hundred shares of the stock of the Pike County Railroad, before that time bargained and sold to the defendant.

This is the cause of action as set forth by the plaintiffs, and it is claimed by them, that they are entitled to recover as damages the par value of the stock, or the amount of calls made from time to time upon it, and which, at the commencement of the suit, amounted to fourteen installments, of five per cent. each, making, in all, twenty-one hundred dollars.

This, we do not think, is a fair view of the defendant's liability upon his promise, if one was made to the plaintiffs. His undertaking is, to subscribe a certain amount of stock, when the subscription books should be opened. This promise does not make him a stockholder, and, as such, liable to calls. The company has parted with no stock to him, and can only claim as damages, the actual loss sustained by them by his failure, or refusal to subscribe, when he was notified the books were opened for such purpose. The company has the stock which the defendant promised to take, but did not take. His promise is like any other promise, or agreement to purchase any specific article of property. If the property contracted for be retained by the vendor, and there is no delivery to the purchaser, or offer to deliver, the damages must not be measured by the value of the property; for it would not be just, in such cases, that the vendor should retain the property, and recover, also, the value of it from the promisor. Some damage might result from the loss of a bargain, and to such the vendor would be entitled, if the extent could be established. In many cases, they would be merely nominal. On an agreement for the sale and purchase of stocks, and a refusal by the purchaser to take the stocks, the measure of damages, ordinarily, might be the difference between the par value of the stocks and their market value, or between them and money. As well argued by the appellant, the defendant having violated his promise by failing to subscribe, he has acquired no right to stock; nor could a recovery in this action entitle him to become a stockholder. The company retains its stock, and the defendant his money. A stock certificate of three thousand dollars would represent a value to the company equivalent to so much money, and, in a statement of their liabilities, this would appear against the company as so much held by the stockholders, for which the company was responsible. If there is no actual subscription, the company does not incur

this liability. There being no special damages alleged, or proved, we do not think the plaintiffs could recover under this declaration, as they have done, the par value of the stock the defendant promised and agreed to take. A proper count might doubtless be so framed as to justify a full recovery, under sufficient proof.

[Remainder of opinion omitted.]

Judgment reversed.

WINDSOR ELECTRIC LIGHT CO. v. TANDY.

1893. 66 Vermont, 248.1

TYLER, J. This is an action of general assumpsit brought by the plaintiff company to recover of the defendant an assessment upon his subscription for shares of the plaintiff's capital stock. After the defendant had rested the court directed a verdict upon the ground that the action could not be maintained in the absence of an express promise.

It appeared in evidence that the defendant and eight other persons, on Feb. 21, 1890, associated themselves together as a corporation, under ch. 153, R. L., as follows:

"We, the subscribers, hereby associate ourselves together as a corporation under the laws of the state of Vermont, to be known by the name of the Windsor Electric Light Co., for the purpose of furnishing electric light, electric heat and electric power at Windsor, in the county of Windsor, in the state of Vermont, with a capital stock of five thousand dollars, divided into two hundred shares of twenty-five dollars each. Dated at said Windsor, this 21st day of February, A. D. 1890."

The articles of association were duly recorded July 3, 1890, in the office of the secretary of state, whereupon the corporation was organized, by-laws were adopted and officers were elected as provided by the statute. At a meeting held Nov. 29, 1890, it was voted to assess the stock one hundred cents on each dollar subscribed, and the assessment was made payable Dec. 15, 1890.

The defendant's subscription was as follows:

"Frank H. Tandy, 80 shares," following which were the names and subscriptions of the other eight subscribers.

Section 3260, R. L., ch. 152, provides that when a proprietor in any corporation does not pay a tax or assessment laid or assessed by such corporation, agreeably to the by-laws thereof, the treasurer may sell, by public auction, the shares of the delinquent under such regulations as the corporation, by its by-laws, directs. There was no provision in

¹ Statement and arguments omitted; also part of the opinion. - ED.

the by-laws that the plaintiff might sell delinquent stock, as is permitted by this section of the statute.

The plaintiff claims that the defendant's subscription to the capital stock raised an implied promise by him to pay all assessments lawfully laid upon his stock, and that the statutory remedy was merely cumulative. The defendant contends that, as there is no provision for the enforcement of payment of assessments either in chapter 153, in the by-laws, or in the articles of association, the plaintiff's only remedy is by a forfeiture and sale, as provided in section 3260.

When the defendant and others, by articles, had associated themselves together pursuant to the provisions of the statute, and the articles had been recorded and certified by the secretary of state, and the corporation had been organized, and all the conditions precedent required by the statute had been complied with, those persons became a body politic and corporate under the laws of the state. The plain-riff's corporate existence was then and thereby established, and the defendant became, by the act of subscription, a stockholder. His subscription is presumed to have been accepted by the plaintiff, and it was binding upon it and upon the defendant, the prospective rights of membership being a sufficient consideration to support the contract. Beach on Pri. Cor., ss. 63 and 513; Hartford & New Haven R. Co. v. Kennedy, 12 Conn. 499.

Whether the defendant, by becoming a stockholder, incurred a personal liability to pay his proportion of such assessments as should be laid upon the stock, can best be determined by inquiring what the relation was which he assumed towards the corporation by the act of subscription. By agreement the entire capital was to be five thousand dollars, divided into two hundred shares of twenty-five dollars each. The defendant subscribed for and agreed to take eighty shares, and the corporation, by accepting his subscription, became obligated to assign that number of shares to him. It seems clear, then, that the defendant impliedly promised to contribute towards the entire capital as much money as his number of shares represented, and in such instalments and at such times as the corporation should require.

In Lake Ontario, etc., R. Co. v. Mason, 16 N. Y. 451, it was held that the defendant's subscription to the articles was, in effect, a contract to pay for the shares for which he subscribed. Dayton v. Boist, 31 N. Y. 435; Phænix Warehouse Co. v. Badger, 67 N. Y. 294; Merrimac Mining Co. v. Levy, 54 Penn. St. 227.

Morawetz on Pri. Cor., s. 56, says that such a subscription does not constitute a mere executory contract of sale, but that the liability to pay the amount of the shares is an incident of the contract of membership; that the moment the subscriber assumes the status of a shareholder he becomes entitled to the rights and privileges incident to membership, and is liable to all the obligations of a stockholder, and must contribute the amount of capital subscribed by him. In section 128 the same writer says that the liability is not merely to

pay for the shares for which he has subscribed, but to contribute to the capital of the company in proportion to the number of shares he has taken. See notes to same section. In Massachusetts, Maine and New Hampshire a different rule has obtained. In those states it has been held that, unless there is an express promise to pay for the shares, the subscriber incurs no personal liability.

[After commenting upon Essex Bridge Co. v. Tuttle, 2 Vermont, 393; Conn. & Pass. R. Co. v. Bailey, 24 Vermont, 465; and R. & B. R. Co. v. Thrall, 35 Vermont, 536.]

Judge Aldis said in the opinion in R. & B. R. Co. v. Thrall:

"At an early day in railway enterprises it was claimed, that where provisions for forfeiture were embodied in the charter, the corporation could not sue for subscriptions, but must and could enforce the payment of them only by proceedings in forfeiture. But it has long been held that the right to sue and to declare stock forfeited co-exist, and that the latter proceeding is merely cumulative. Such it was intended to be in this charter."...

While the case cannot be regarded as authority upon the point here in controversy, we think that the rule stated in the extract quoted from the opinion is the more just, and ought to be adopted rather than the one that prevails in some of the other states.

It was not necessary that the defendant should expressly promise to pay for his shares, or to contribute his proportionate amount of the \$5,000 capital. The promise is clearly implied, and the action can be maintained upon it. The remedy by forfeiture is only cumulative.

Judgment reversed and cause remanded.

ATHOL MUSIC HALL CO. v. CAREY.

1875. 116 Massachusetts, 471.2

CONTRACT on the following agreement:

"We, the undersigned, severally promise and agree to and with each other that we will associate ourselves into a corporation, the name whereof shall be determined by the members thereof, and pay to the treasurer of said corporation the amount of the several shares set against our respective names, for the purpose of purchasing the homestead of Washington H. Amsden, in Athol, on Main Street, and erecting a public hall thereon. The amount of the capital stock of said corporation to be not less than twenty thousand dollars.

Names. No. of shares. Amount. John Carey, One, \$100."

For an exhaustive argument in support of this view, see the opinion of Huntington,
 in Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499. —Ed.
 Statement abridged. — Ed.

The declaration alleged that the defendant entered into and signed the above contract, (a copy whereof was annexed,) and thereby agreed, in consideration of other parties signing similar agreements, to pay to the treasurer of the Athol Music Hall Company, the sum of \$100, for one share in the capital stock of said corporation when it should be organized. It then alleged the organization, the purchase of the homestead of Amsden, the building of a public hall thereon, a demand for the \$100, readiness to deliver the stock, and the refusal of the defendant to pay.

At the trial in the Central District Court of Worcester, the defendant asked the judge to rule that the action could not be maintained on the pleadings. This request was refused.

There was evidence tending to show that in December, 1870, the defendant signed the agreement declared upon; that the act of incorporation was passed on March 3, 1871; that the corporation was duly organized on March 18, 1871, and that the name of the defendant was entered on the books of the corporation as a stockholder and notices were issued and directed to him of all the meetings.

The defendant then asked the judge to instruct the jury that if they were satisfied upon the evidence that the defendant never attended any meeting of the corporation at the time of its organization, or after its organization, the action could not be maintained, although the corporation still retained his name upon its books, and sent him notices of the meetings; that it was not enough for the plaintiff to show that it retained Carey's name upon its books, and otherwise considered him as entitled to a share in the capital stock, unless they are also satisfied that Carey did some act after its organization in ratification of his agreement.

The judge refused to give these instructions, but instructed the jury that if the plaintiff entered the defendant's name on the books of the corporation, as a stockholder, issued and directed notices to him of all its meetings, and gave him the same opportunities to attend the meetings and participate in the proceedings thereof as were given to other stockholders, they were authorized to find that the defendant's offer was accepted, and that he was received as a member of the corporation. The jury found for the plaintiff, and the defendant alleged exceptions.

H. L. Parker, for the defendant.

W. W. Rice & F. T. Blackmer, for the plaintiff.

Wells, J. In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, "to and with each other," is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should

sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to wit, as a contract with the common representative of the several associates.

In Thompson v. Page, 1 Met. 565, and Ives v. Sterling, 6 Met. 310, individuals subsequently selected by voluntary associations to receive and expend subscriptions, in accordance with the terms of the agreement of association, were allowed to maintain actions against individual subscribers for the amount of their several subscriptions. Being thus constituted the payees, they were construed to have become also the promisees under the written agreement. The same principle applies where the agreement contemplates the organization of a corporation, and refers the payment of the subscriptions to the proper officers of such corporation. See People's Ferry Co. v. Balch, 8 Gray, 303, 311.

In this agreement the treasurer of the corporation to be established is expressly made payee. The corporation is the aggregate of the several individuals entering into the agreement, one of whose terms was that they should thus associate and confer their individual rights upon the corporation. We are of opinion that the corporation, and the corporation alone, is the proper party to bring an action upon such an agreement.

The corresponding agreements of the other subscribers, the organization of the corporation, and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was originally voluntary, or in the nature of a mere open proposition, yet having been accepted and acted on by the party authorized so to do, before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation. The votes of the corporation indicate sufficient authority for the institution of this suit in the corporate name and behalf.

These considerations dispose of all the objections, taken in various forms, to the maintenance of the action.

Exceptions overruled.

¹ As to the question of "consideration," where the agreement to take shares is made simply by the subscribers among themselves; see the discussion in Taylor on Corporations, 4th ed. ss. 92, 93, 94.—ED.

BRYANT'S POND STEAM-MILL CO. v. FELT.

1895. 87 Maine, 234.1

Walton, J. The only question we find it necessary to consider is whether a subscriber to the capital stock of an unorganized corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. It takes two parties to make a contract. A non-existing corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it.

The right of subscribers to the capital stock of a proposed corporation to withdraw their subscriptions at any time before the organization of the corporation is completed has been affirmed in several recent and well considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties only one of which is in existence. There can be no meeting of the minds of the parties. There can be no acceptance of the subscriber's proposition to become a stockholder. There can be no mutuality of rights or obligations. There can be no consideration for the subscriber's promise. As said in one of our own decisions, it is a mere nudum pactum, — a promise without a promisee, — a contractor without a contractee. In fact, every element of a binding contract is wanting. If the subscriber's promise to take and pay for shares remains unrevoked till the organization of the proposed corporation is effected, and his promise has been accepted, then we have all the elements of a valid contract. Competent parties. Mutuality of duties and obligations. A valid consideration, the promise of one party being a sufficient consideration for the promise of the other. A promise as well as a promisor. A contractee as well as a contractor. In fact, all the elements of a valid contract are present, and the subscription has become binding upon both of the parties. But, till the corporation has come into existence, all these elements are necessarily wanting, and the subscriber's promise amounts to no more than an offer, which, like all mere offers, may be withdrawn at any time before acceptance. When accepted, it becomes binding. Till accepted, it remains revocable. This conclusion is sustained by reason and authority.

In Hudson Real Estate Co. v. Tower, 156 Mass. 82 (1892), the action was founded on a subscription to the capital stock of an unorganized corporation, and the defense was based on an alleged withdrawal of the subscription. The right to withdraw was controverted.

¹ Statement and part of opinion omitted. - ED.

The court held that at the time when the defendant signed the subscription paper declared on, it was not a contract, for want of a contracting party on the other side; that while such a subscription may become a contract after the corporation has been organized, still, until the organization is effected, and the subscription is accepted, it is a mere proposition or offer, which may be withdrawn, like any other unaccepted proposition or offer.

It is urged by the counsel for the plaintiff corporation that such subscriptions create binding and enforceable contracts between the subscribers themselves, and are therefore irrevocable, except with the consent of all the subscribers; and some of the authorities cited by him seem to sustain that view. But we find, on examination, that such views, when expressed, are in most cases mere dicta, and that the cases are very few in which such a doctrine has been acted upon. Reason and the weight of authority are opposed to such a view. Of course, subscription papers may be so worded as to create binding contracts between the subscribers themselves. But we are not now speaking of such subscriptions; or of voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding. We are now speaking only of subscriptions to the capital stock of proposed business corporations. With regard to such subscriptions, we regard it as settled law that they do not become binding upon the subscribers till the corporations have been organized and the subscriptions accepted; and that, till then, the subscribers have a right to revoke their subscriptions. And, in view of the fact that such subscriptions are often obtained by over persuasion, and upon sudden and hasty impulses, we are not prepared to say that the rule of law which allows such a revocation is not founded in wisdom. We think it is.

Judgment for defendant.

LINCOLN SHOE MFG. CO. v. SHELDON.

1895. 44 Nebraska, 279.1

ERROR from the District Court of Lancaster County.

The petition contains (inter alia) the following allegations:

Plaintiff is a corporation, organized and incorporated Feb. 10, 1890, under the general laws of Nebraska relating to manufacturing corporations; having a capital stock of \$100,000, divided into 2000 shares

rations; having a capital stock of \$100,000, divided into 2000 shares of \$50 each, of which more than 10 per cent has been subscribed. On March 22, 1890, the defendant, with other persons, became a subscriber to the capital stock by severally executing and delivering the following agreement in writing: "For value received we, the under-

¹ Statement abridged. Arguments and part of opinion omitted. - ED.

signed subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our names in the Lincoln Shoe Manufacturing Company at fifty (\$50) dollars per share; one fourth of the amount so by us subscribed respectively to be paid when the foundation of the building is laid; one fourth when the building is under roof, the balance on call of the directors. In consideration of the building being erected on the west half of the northeast quarter of section twenty eight (28), town ten (10), range six (6), along the line of the Lincoln & Northwestern railroad. Witness our hands on this 22d day of March, 1890." Defendant placed the number of fifty shares opposite his name; and thereby agreed to take that number of shares and agreed to pay the plaintiff therefor the sum of \$2500. After more than 10 per cent of the capital stock had been subscribed, the plaintiff company commenced the erection of a building. foundation was laid June 10, 1890; and on Sept. 1, 1890, the building was erected and under roof; and it was on the land described in the agreement. Plaintiff, before the beginning of the action, demanded of defendant payment of the two instalments of one fourth each which had thus become due, and tendered certificates of stock to defendant, who has not paid said instalments. Plaintiff prays judgment for \$1250, with interest.

A demurrer to this petition was sustained by the District Court. Plaintiff brought error.

Thomas C. Munger, for plaintiff in error.

Pound & Burr, contra.

RAGAN C. [after stating the case]:

Two arguments are relied upon here to sustain the judgment of the district court.

1. The first contention is that the contract of Sheldon made the basis of this suit is an agreement to purchase certain shares of stock of the manufacturing company, and not a subscription to the stock of such company; and that the measure of the manufacturing company's damages is the difference in the actual value of the stock and the price which Sheldon agreed to pay for it at the date of the breach of his contract; and since the petition does not allege what the value of the stock was at the date Sheldon refused to take it, that it does not state a cause of action. Is the contract of Sheldon a contract to purchase stock in the manufacturing company, or is it a contract of subscription to the capital stock of such corporation? Whether one or the other is a matter of construction for the court, and to be determined from the intention of Sheldon, gleaned from the contract itself and the law in force applicable to the subject-matter of the contract. The manufacturing company is a corporation organized under chapter 16. Compiled Statutes, 1893, entitled "Manufacturing Companies." Section 37 of that chapter provides that whenever any number of persons associate themselves together for the purpose of engaging in the business of manufacturing they shall make a certificate specify-

ing the amount of capital stock necessary, the amount of each share, the name of the place where the corporation shall be located, and the name by which it shall be known; that such certificate shall be certified and forwarded to the secretary of state and by him recorded; and when these things are done that the persons so associating themselves together are authorized to carry on manufacturing operations by the name they have adopted; and section 39 of the chapter provides: "The persons named in the certificate of incorporation, or a majority of them, shall be commissioners to open books for the subscription to the capital stock of said company, at such times and places as they shall deem proper, and the said company are [is] authorized to commence operations upon the subscription of ten per cent of said stock." It appears from the petition that on the 10th of February, 1890, certain gentlemen associated themselves together for the purpose of organizing the manufacturing company; that they made the certificate contemplated by said section 37 on that date and filed it with the secretary of state; and on the 22d of March afterwards Sheldon signed the contract sued upon in this case. The presumption then is that the gentlemen, or a majority of them, who executed the certificate of incorporation provided for by said section 37, after it was executed and filed with the secretary of state, opened books to enable persons, who might desire to do so, to subscribe for the capital stock of the corporation, and that the contract sued upon was made by Sheldon at such time. The law does not require that the capital stock of a corporation like this shall be subscribed before its certificate of incorporation is executed and filed with the secretary of state; indeed the statute contemplates that the certificate of incorporation shall be first made and filed and afterwards the stock books opened.

The language of the contract in suit is: "We, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our names in the Lincoln Shoe Manufacturing Company at fifty dollars per share; one-fourth of the amount so by us subscribed, respectively, to be paid when the foundation of the building is laid; one-fourth when the building is under roof; the balance on call of the directors." While it is true that the word "purchase" is in the contract, yet we are unable to construe this contract as a contract of sale of stock. The corporation did not own any stock. The averments of the petition exclude the presumption that this manufacturing company on the 20th of March, 1890, was the owner of any of its stock and that it agreed on that day to sell its stock or any of it to Sheldon. When we take into consideration the law under which this incorporation was organized: that it was authorized to commence business when ten per cent of its capital stock had been subscribed; that after its articles or certificate of incorporation had been filed with the secretary of state, that the persons executing such certificate had the right to open books for

subscriptions to the capital stock of the corporation; that the contract bound the signer of it to pay one-fourth of the value of fifty shares of stock at fifty dollars a share when the foundation of the building to be used by the manufacturing company should be laid, and a like one-fourth when such building should be under roof, and the remainder of the value of said fifty shares at fifty dollars per share on call of the directors, we are forced to the conclusion that by the contract in suit Sheldon subscribed and agreed to pay for, in the manner stated in the contract, fifty shares of the capital stock of the manufacturing company. For the purposes of this case, however, we think it entirely immaterial whether the contract of Sheldon is one to purchase fifty shares of stock of this manufacturing company, or whether by the contract he subscribed for fifty shares of this stock. The petition alleges that before the bringing of this suit the foundation of the building to be used by the manufacturing company had been laid and such building was under roof, and that the manufacturing company demanded of Sheldon that he pay it \$1250, the agreed value of twenty-five shares of said stock, and at the same time tendered him certificates of the stock of said corporation for the amount of money claimed. So that if we should adopt the construction of this contract claimed by Sheldon he would still be liable to the manufacturing company for the agreed price of the shares of stock. Sheldon's having agreed to purchase fifty shares of this stock at fifty dollars per share, and the manufacturing company having tendered him the stock, it would be entitled to recover the contract price of the stock. (3 Parsons, Contracts [5th ed.], 209.

[After referring to Wasson v. Palmer, 17 Nebr. 330; Thrasher v. Pike County R. Co., 25 Ill. 393; and Thompson v. Alger, 53 Mass. 428.]

These decisions are but applications of the well known rule that where a vendee refuses to perform his contract the vendor has either one of two remedies: he may keep the property made the subject of the contract and sue the vendee for his failure to perform, and in such case his measure of damages will be the difference between the contract price of the property and its actual value at the date of the breach of the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then in a suit upon the contract the vendor's measure of damages will be the contract price of the property.

2. The second contention is that the petition fails to state a cause of action for the reason that it shows that the whole amount of capital stock provided by the articles of incorporation of the manufacturing company has not been subscribed. To sustain this contention we are cited to Livesey v. Omaha Hotel Co., 5 Neb. 50, in which it was held: "When the subscription contract or charter of a corporation specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the capital so fixed must be fully

subscribed before an action will lie against a subscriber to recover assessments levied on the shares of stock, unless there is a clear provision in the contract to proceed with the accomplishment of the main design with a less subscription than the whole amount of capital specified, or there is a waiver of the condition precedent," and Hale v. Sanborn, 16 Neb. 1, and Hards v. Platte Valley Improvement Co., 35 Neb. 263. The general rule announced in the case in 5 Neb. was followed and adhered to in the cases in the 16th and 35th; but these cases are not in point here. In the case in 5 Neb. the corporation was a hotel company, in 16 Neb. the corporation was a flouring mill, and in 35 Neb. the corporation was organized for the erection and operation of a hall for the use of societies, organized meetings, and for such other purposes as the trustees of the corporation might deem for the benefit of the stockholders. In other words, none of the corporations were manufacturing corporations. The corporations mentioned in those cases were organized under the general incorporation laws of the state, and there is no provision in this general law by which a corporation is authorized to commence the transaction of business until all its capital stock is subscribed. In the case at bar the corporation is a manufacturing corporation and expressly authorized by the statute under which it was incorporated to commence business when ten per cent of its capital stock should be subscribed. Cook, in his work on Stock and Stockholders, after stating the general rule that it is an implied part of a contract of subscription to the capital stock of a corporation that the contract is to be binding and enforceable against the subscriber only after the full capital stock of the corporation has been subscribed, says: "The act of incorporation may of course vary this rule. Thus, it is well established that where the charter authorizes the organization of the company, and the commencement of corporate work after a certain amount of the capital stock has been subscribed, such a charter provision is equivalent to an express authority to the corporation to call in the subscriptions as soon as this organization is effected. Subscriptions to the full amount of the capital stock are held not to be necessary. The defence is not good." (1 Cook, Stock & Stockholders, sec. 177.) In this state the legislature does not by a special act charter a corporation, but all corporations are formed under general laws, and these laws and the articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of a corporation of this state.

In Jewett v. Valley R. Co., 34 O. St., 601, the contract sued upon was in the following language: "'We, the undersigned, hereby respectively subscribe to and agree to take of the capital stock of the Valley Railway Company the number of shares, of fifty dollars each, set opposite our respective signatures," etc. The capital stock of the railway company was fixed by its certificate of incorporation at three millions of dollars. Jewett subscribed for one hundred shares

of its stock amounting to \$5,000. A law in force in Ohio at the time provided that railroad corporations, so soon as ten per cent of their capital stock should be subscribed, might give notice to the stockholders to meet for the purpose of choosing directors and construct and maintain a railroad. The railroad company sued Jewett on his subscription, and he defended on the ground that, as the entire amount of the capital stock authorized by the certificate of incorporation had not been subscribed, he was not liable. The court said: "Can assessments be made and enforced on subscriptions for shares of the capital stock of a railroad corporation before the whole amount of stock, mentioned in the certificate of incorporation, has been subscribed? In the absence of both legislation and express agreement on the subject, they cannot." The court then cites Salem Mill-Dam Corporation v. Ropes, 6 Pick. [Mass.], 23, and other cases supporting the general doctrine, and continues: "In most states, however, provision has been made by statute; and it is well settled that 'contracts must be expounded according to the laws in force at the time they are made, and the parties are as much bound by a provision contained in a law as if that provision had been inserted in and formed a part of the contract.' . . . A careful consideration of the enactments set forth in the statement of this case, and other cognate statutory provisions, leaves with us no doubt that when ten per cent of the capital stock had been subscribed the company may organize by the election of directors, who may 'transact all business of the corporation,' and, looking to the duties imposed on the directors, it is clear that the residue of the stock, beyond the ten per cent, . . . must 'be paid in such installments and at such times and places, and to such persons as may be required by the directors of such company,' though the whole amount of the capital stock may not have been subscribed. . . . The terms of the subscription on which this suit was brought are in harmony with the statutory provisions as we have construed them; and hence the fact that the whole of the capital stock had not been taken afforded no defence to this action." (See, also, Hunt v. Kansas & Missouri Bridge Co., 11 Kan. 412.)

We conclude, therefore, that the fact that all the stock authorized by the articles of incorporation of a manufacturing company has not been subscribed is not a defence to a subscriber for such stock when sued on his contract of subscription, if ten per cent of the stock of such manufacturing corporation has been subscribed. The judgment of the district court is reversed and the cause remanded.

Reversed and remanded.

MINNEAPOLIS THRESHING MACHINE CO. v. DAVIS.

1889. 40 Minnesota, 110.1

MITCHELL, J. This was an action to recover instalments due on subscriptions to stock of the plaintiff. The facts fully appear from the findings of the court, in connection with Exhibits A and B attached to the complaint. Those material for present purposes are that, a scheme having been started to organize a manufacturing corporation with \$250,000 capital, whose works should be located at Junction City, near Minneapolis, and one McDonald having proposed that if the citizens of Minneapolis would subscribe \$190,000 to the capital stock, he would subscribe the remaining \$60,000, one Janney, a promoter, but not a subscriber to the stock of the proposed corporation, acting as a voluntary solicitor, having with him the subscription paper, (Exhibits A and B,) about April 1, 1887, proceeded to canvass for subscriptions to the stock of the proposed corporation, on the terms and conditions embodied in the paper. He first applied to defendant, who subscribed \$5,000 of stock. Afterwards, and about the same date, other citizens respectively subscribed to the stock, on the same paper, to the aggregate amount, including defendant's subscription, of \$190,000, of which over \$65,000 has been paid in to plaintiff. Thereupon McDonald, in accordance with his proposition, subscribed the remaining \$60,000, which he has paid up in full. All the conditions expressed in the written subscription (Exhibit A) having been fully performed and complied with, the proposed corporation was afterwards, about April 25, 1887, organized, and these subscriptions to its stock delivered over to it. The corporation, acting in good faith upon such subscriptions, including that of defendant, expended large sums of money in locating and constructing its works, and entered into large contracts, and incurred liabilities to the amount of over \$75,000. During all this time, the corporation had no notice or knowledge of any condition being attached to defendant's subscription other than those expressed in the subscription paper itself. Neither is it found or claimed that any of the other subscribers to the stock had any such notice or knowledge. Defendant was not present at the organization of the corporation, and never attended or took part in any of its meetings, and had no notice or knowledge that the subscription paper had been transferred or delivered over to the plaintiff, or that plaintiff relied on it, until about November, 1887, just prior to the commencement of this action.

Upon the trial the defendant was permitted, against plaintiff's objection and exception, to testify that he signed or subscribed to the stock only upon the express oral condition and agreement, then had between him and Janney, that the latter should retain in his possession

¹ Statement omitted, - ED.

said agreement with his name signed thereto, and not deliver it to any one, or use it in any way, until certain four persons should subscribe to the stock, each in the sum of \$5,000; that Janney took the agreement from defendant on that express condition and understanding, and not otherwise; that none of these four persons ever did subscribe to the stock of the plaintiff; and that defendant never authorized Janney or any one to deliver said agreement to any one except upon the condition referred to. The court found the facts to be in accordance with the testimony, and upon that ground found as a conclusion of law that defendant never became a subscriber to the plaintiff's stock. The competency of this evidence is the sole question in this case.

Under the elementary rule of evidence that a written agreement cannot be varied or added to by parol, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing to be effectual. This rule applies with special force to a case like the present, where to allow the defendant now to set up a secret parol arrangement by which he may be released, while his fellow-subscribers continue to be bound, would be a fraud, not only upon them, but upon the corporation which has been organized on the faith of these subscriptions and upon its creditors. The defendant of course does not attempt to controvert so elementary a rule as the one suggested, but contends that the effect of this evidence was not to vary or contradict the terms of the writing, but to prove that there was never any delivery of it, and hence that there never was any contract at all, delivery being prerequisite to the very existence of a contract. His claim is that the subscription paper was given to and received by Janney merely as an escrow, or as in the nature of an escrow, only to be delivered or used upon the performance of certain conditions precedent, and that until they were performed there could be no valid delivery.

In determining this question it becomes important to consider the nature of a subscription to the stock of a proposed corporation, and the relation of the different parties to each other, under the facts of this case. A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: First. It is a contract between the subscribers themselves to become stockholders without further act on their part immediately upon the formation of the corporation. As such a contract it is binding and irrevocable from the date of the subscription, (at least in the absence of fraud or mistake,) unless cancelled by consent of all the subscribers before acceptance by the corporation. Second. It is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation. 1 Mor. Priv. Corp. § 47 et seq.; Red Wing Hotel Co. v. Frederich, 26 Minn. 112. (1 N. W. Rep. 827.) Janney, the promoter who solicited and obtained

the subscriptions, occupied the position of agent for the subscribers as a body, to hold the subscriptions until the corporation was formed in accordance with the terms and conditions expressed in the agreement, and then turn it over to the company without any further act of delivery on part of the subscribers. The corporation would then become the party to enforce the rights of the whole body of subscribers. It follows, then, that, considering the subscription as a contract between the subscribers, a delivery to Janney by a subscriber was a complete and valid delivery, so that his subscription became eo instanti a binding contract. The case stands precisely as a case where a contract is delivered by the obligor to the obligee. It cannot therefore be treated as a case where a writing has been delivered to a third party in escrow.

The defendant, however, attempts to bring the case within the rule of Westman v. Krumweide, 30 Minn. 313, (15 N. W. Rep. 255,) in which this court held that parol evidence was admissible to show that a note delivered by the maker to the payee was not intended to be operative as a contract from its delivery, but only upon the happening of some contingency, though not expressed by its terms; that is, that the delivery was only in the nature of an escrow. We so held upon what seemed the great weight of authority, although the doctrine, even to the extent it was applied in that case, is a somewhat dangerous one. The distinction between proving by parol that the delivery of a contract was conditional, and that the contract itself contained a condition not expressed in the writing, is one founded more on refinement of logic than upon sound practical grounds. It endangers the salutary rule that written contracts shall not be varied by parol. Said Erle, J., in Pym v. Campbell, 6 El. & Bl. 370, in sustaining such a defence: "I grant the risk that such a defence may be set up without ground, and I agree that a jury should therefore look on such a defence with suspicion." And in all the cases where such a defence has been sustained, so far as we can discover, they have been cases strictly between the original parties, and where no one has changed his situation in reliance upon the contract and in ignorance of the secret oral condition attached to the delivery, and hence no question of equitable estoppel arose. Many of the cases have been careful to expressly limit the rule to such cases. Benton v. Martin, 52 N. Y. 570; Sweet v. Stevens, 7 R. I. 375.

Conceding the rule of Westman v. Krumweide, supra, to its full extent, there are certain well-recognized doctrines of the law of equitable estoppel which render it inapplicable to the facts of the present case. This subscription agreement was not intended to be the sole contract of defendant. It was designed to be also signed by other parties, and from its very nature defendant must have known this. Each succeeding subscriber executed it more or less upon the faith of the subscriptions of others preceding his. The paper purports on its face to be a completed contract, containing all the terms and con-

ditions which the subscribers intended it should. When this agreement was presented to others for subscription, defendant had not only signed it in this form, but he had also done what, under the facts, constituted, to all outward appearances at least, a complete and valid delivery. He had placed it in the proper channel according to the ordinary and usual course of procedure for passing it over to the corporation when organized, and clothed Janney with all the indicia of authority to hold and use it for that purpose without any other or further act on his part, untrammelled by any condition other than those expressed in the writing. In reliance upon this, others have not only subscribed to the stock, but have since paid in a large share of it. The corporation has been organized and engaged in business, expending large sums of money, and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of this secret oral condition which defendant now claims to have attached to the delivery. To permit defendant to relieve himself from liability on any such ground, under this state of facts, would be a fraud on others who have subscribed and paid for stock, upon the corporation which has been organized and incurred liabilities in reliance upon the subscriptions, and on creditors who have trusted it. The familiar principle of equitable estoppel by conduct applies, viz.: Where a person, by his words or conduct, wilfully causes another to helieve in the existence of a certain state of facts, and induces him to act on that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.

We have examined all of the numerous cases cited by defendant's counsel, and fail to find one which, in our judgment, is analogous in its facts, or the law of which will cover the present case. The two which at first sight might seem most strongly in his favor are Beloit & Madison R. Co. v. Palmer, 19 Wis. 574, and Ottawa, etc., R. Co. v. Hall. 1 Bradw, 612. But an examination of those cases will show that in neither did or could any question of estoppel arise, and in both the court held that the person to whom the instrument was delivered after signature was a stranger to it, so that it was strictly a delivery in escrow to a third party. Cases are cited where a surety signed a bond or non-negotiable note, and delivered it to the principal obligor upon condition that it should not be delivered to the obligee until some other person signed it, and where, without such signature, the principal obligor delivered it to the obligee and yet the courts held that the surety was not liable, although the obligee had notice of the condition. Such cases seem usually to proceed upon the theory that a delivery to the principal obligor under such circumstances is a mere delivery in escrow to a stranger; the term "stranger," in the law of escrows, being used in opposition merely to the party to whom the contract runs. It may well be doubted whether in such cases, where the instrument is complete on its face, the courts

have not sometimes ignored the law of equitable estoppel. No such defence would be allowed in the case of negotiable paper, and it is not clear why the distinction should be drawn on that line. The doctrine of estoppel rests upon totally different grounds, and operates independently of negotiability, being founded upon principles of equity. But whether the cases referred to be right or wrong, we do not see that they are in point here. Our conclusion is that the court erred in admitting the evidence objected to, and for that reason a new trial must be awarded.

Order reversed.

PACIFIC NATIONAL BANK v. EATON.

1891. 141 U.S. 227.1

Error to Supreme Court of Massachusetts.

Action at law by Mary J. Eaton, to recover from the bank an amount paid in as a subscription to an increase of its stock. Plaintiff on Sept. 28, 1881, paid the bank for the stock; and received a receipt—"Received of Mary J. Eaton four thousand dollars on account of subscription to new stock." Certificates for the new stock were made out in a book, with stubs to indicate their contents, and were delivered to the stockholders as they called for them. Such a certificate was made out for Miss Eaton, but she never called for it, though she was registered in the stock register of the bank as owner thereof without her knowledge. On Jan. 10, 1882, the plaintiff demanded of the bank repayment of said four thousand dollars, upon the ground that the conditions upon which it was received had not been performed. The Supreme Court of Massachusetts sustained this contention of the plaintiff.

A. A. Ranney, for plaintiff in error.

J. H. Benton, Jr., for defendant in error.

Bradley, J. [After deciding another point.]

The only question to be considered, therefore, is whether the fact that the defendant in error did not call for and take her certificate of stock made any difference as to her status as a stockholder. We cannot see how it could make the slightest difference. Her actually going or sending to the bank and electing to take her share of the new stock, and paying for it in cash, and receiving a receipt for the same in the form above set forth, are acts which are fully equivalent to a subscription to the stock in writing, and the payment of the money therefor. She then became a stockholder. She was properly entered as such on the stock book of the company, and her certificate of stock was made out ready for her when she should call for it. It was her certificate. She could have compelled its delivery had it

¹ Only so much of the report is given as relates to a single point. — ED.

been refused. Whether she called for it or not was a matter of no consequence whatever in reference to her rights and duties.

The case is not like that of a deed for lands, which has no force, and is not a deed, and passes no estate, until it is delivered. In that case everything depends on the delivery. But with capital stock it is different. Without express regulation to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper officer, and being entered on the stock book as a stockholder. He may take out a certificate or not, as he sees fit. Millions of dollars of capital stock are held without any certificate; or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself. And an actual subscription is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the party.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CHAPTER VI.

PROMOTERS.

ERLANGER v. NEW SOMBRERO PHOSPHATE CO.

1878. Law Reports, 3 Appeal Cases, 1218.1

APPEAL against a decision of the Court of Appeal which had reversed a decree of Vice Chancellor Malins.

Sombrero, a small island in the West Indies, the property of the Crown, had been leased out by the Crown for 21 years from 1865. This lease had been assigned to "The Sombrero Company," which undertook to work the beds of phosphate of lime with which the island abounded. This company was ordered to be wound up. The lease was ordered to be sold by the official liquidator, Mr. Chatteris. Erlanger and others formed a syndicate to purchase it, and did purchase it for £55,000. The purchase was effected by a provisional contract Aug. 30, 1871, though not formally concluded until later. The syndicate desired to resell the lease at a profit; and with that view proceeded to get up a company to purchase it from the syndicate.

Erlanger, who acted for the syndicate, took steps to form a company, under the Companies Act. A memorandum of association was drawn up by the solicitor of the syndicate, and was signed by seven persons all of whom were mere nominees of the syndicate. The articles of association for the company were drawn by the same solicitor, and bear date Sept. 20, 1871. These articles provide that the first board of directors shall consist of five specified persons; that two directors shall be a quorum for the transaction of business; and that the directors may, without any further authority from the members, adopt and carry into effect the contract, of even date, for the assignment to the company of the island of Sombrero for the residue of the term of the lease.

A contract had also been drawn up, and dated Sept. 20, for the sale of the lease to the new company. This contract purported to be made between Evans as vendor and Pavy as purchaser on behalf of the new company. Evans was a trustee or agent for the members of the syndicate. The contract was, on the face of it, a provisional one,

¹ Case abridged. Arguments omitted; also greater part of the opinions. - ED.

subject to the formation of the company, and the adoption of the contract by it. This contract recited the purchase by the syndicate on Aug. 30, but did not name the price then given. The price to the new company was to be £110,000, of which £80,000 was to be paid down, and the remaining £30,000 to be satisfied by fully paid-up shares in the new company. The money was to be obtained by the subscriptions for the shares, which were to be 13,000 in number of £10 each.

The five persons specified in the articles as directors were all named by the syndicate. Two of them were persons not likely to act, and who did not act, in the early proceedings of the board. The other three were Evans, Macdonald and Dakin. Evans' shares were given to him by Erlanger. Macdonald held shares only as trustee for Erlanger. Dakin had not sufficient knowledge of the facts to form an independent judgment. The first meeting of the directors was held Sept. 29, 1871; and was attended by Evans, Macdonald and Dakin. It was resolved that the contract of purchase for £110,000 "be approved and confirmed." A prospectus was soon issued; and after its publication the number of applications for shares became considerable.

There was never any confirmation of the purchase by vote of the stockholders.

Subsequently, after new directors had been chosen, the bill in this suit was filed by the company against Erlanger and all the members of the syndicate; one prayer being that the contract of Sept. 20 might be set aside; and the purchase money repaid to the company.

The case was heard before Vice Chancellor Malins, who ordered the bill to be dismissed, but without costs. On appeal by the company, the contract was ordered to be rescinded as to all members of the syndicate, the purchase money paid by the company repaid, and, on payment of the money so ordered to be repaid to the company, the island was to be restored by the company to the syndicate.

Erlanger et als. then brought the present appeal to the House of Lords.

The case was twice argued.

Southgate, Q. C., and Benjamin, Q. C. (Ingle Joyce with them), for appellants.

J. Napier Higgins, Q. C., and Davey, Q. C. (Alexander Young with them), for respondents.

LORD PENZANCE. [After stating the facts.]

Can a contract so obtained be allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement I invite your Lordships to draw two conclusions: first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was brought about by the conduct and contrivance of the vendors themselves. It

was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as it seems to me, bound according to the principles constantly acted upon in the Courts of Equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts. The obligation rests upon them to shew they have not made use of the position which they occupied to benefit themselves; but I find no proof in the case that they have discharged that obligation. There is no proof that either Sir Thomas Dakin or Admiral Macdonald was aware of the price at which the property had just been brought under the authority of the Court of Chancery, nor, indeed, that they even knew that the real vendors were also the promoters of the company. And there is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promotors in such a way as to create an independent body capable of acting impartially in defence of the company's interests.

A contract of sale effected under such circumstances is, I conceive, upon principles of equity liable to be set aside.

The principles of equity to which I refer have been illustrated in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and cestui que trust, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of shewing that he has not used it to his own benefit.

I have no difficulty, therefore, in asking your Lordships to assent to the proposition of the Lord Chancellor, that if, within a proper time after the completion of this purchase, a bill had been filed by the company, the purchase must have been set aside. The question remains whether the present bill has been filed with sufficient promptitude for that purpose.

[His Lordship held, that the company was not barred by laches. The facts relating to this branch of the case have been omitted.]

LORD CAIRNS; Lord Chancellor.

[After referring to purchase by the syndicate on Aug. 30, 1871.]

My Lords, I stop at this point for the purpose of saying that I think it to be clear that the syndicate in entering into this contract acted on behalf of themselves alone, and did not at that time act in, or occupy, any fiduciary position whatever. It may well be that the prevailing idea in their mind was, not to retain or work the island, but to sell it again at an increase of price, and very possibly, to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked; to use it as they liked, and to sell it how, and to whom, and for what price they liked. part of the case of the Respondents which, as an alternative, sought to make the Appellants account for the profit which they made on the re-sale of the property to the Respondents, on an allegation that the Appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the Judges in the Courts below.

[After stating the subsequent proceedings up to and including Sept. 20.]

In the whole of this proceeding up to this time the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.

[His Lordship was of opinion that the company was barred by laches from obtaining the relief prayed for.]

LORD BLACKBURN.

Throughout the *Companies Act*, 1862 (25 & 26 Vict. c. 89), the word "promoters" is not anywhere used. It is, however, a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company.

Neither does this Act in terms impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as they choose to give to those managers, so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which those promoters have chosen. And I think those who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the Legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests. And consequently they do stand with regard to that corporation when formed, in what is commonly called a fiduciary relation to some extent. Some reference was made in the argument to the Companies Act, 1867 (30 & 31 Vict. c. 131, s. 38), on the construction of which there has been a great diversity of judicial opinion. That section does contain the word "promoters," which, as I have already observed, is not to be found in the Companies Act, 1862, but it imposes no fresh duty on them with regard to the company. imposes a fresh duty towards, and gives a new cause of action to, persons who take shares in the company as individuals; it does not affect the obligation of the promoters towards the corporation. I think that the extent of that fiduciary relation, which, as already said, in my opinion, the promoters bear to the company, is a very important consideration in construing that section; and I am desirous to avoid prejudging that question by saying in this case more than is necessary for its decision. I think, as already said, that the promoters are in a situation of confidence to some extent towards the company they form.

Where, as in the present case, the company is formed for the purpose of becoming purchasers from the promoters as vendors, the interests of the promoters and of the company clash. It is the vendors' interest to get as high a price as possible, and they have a strong bias to overvalue the property which they are selling; it is the purchasers' interest to give as low a price as possible, and to secure that the price actually given is not more than the property is really worth to them.

Lord *Eldon*, in *Gibson* v. *Jeyes*, says that "it is a great rule of the Court that he who bargains in matters of advantage with a person placing confidence in him, is bound to shew that a reasonable use has been made of that confidence — a rule applying to trustees, attorneys, or any one else." I think persons having property to sell may form a company for the purpose of buying it in such a manner as to shew this, and when they do so, the sale will be unimpeachable. I will not attempt to define how this may be done. Probably there are many ways. What I shall do is to inquire what, on the evidence, appears to have been done in this case, and then to confine myself to saying whether, on the facts of this particular case, it appears that an unreasonable use has been made of that confidence which the company did not indeed place in the promoters, for the company did not then exist, but which the Legislature did place in them for the company when it gave the promoters power to create it.

[Opinions concurring with Lord Penzance were delivered by Lords HATHERLEY, O'HAGAN, SELBORNE, and GORDON.]

Order appealed from affirmed.

GREENWOOD v. LEATHER SHOD WHEEL CO.

1899. Law Reports (1900), 1 Chancery Division, 421.2

ACTION by a shareholder in the defendant company against the company, the directors, and the promoter, T. H. Lambert.

The company was registered Feb. 12, 1897, under the Companies Acts. T. H. Lambert was the promoter. By authority of the directors, and of Lambert, a prospectus, dated Feb. 10, 1897, was issued to the public inviting subscriptions for shares.

Section 38 of the Companies Act, 1867, is as follows: "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors of the company or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

At the end of the prospectus (issued as above stated), under the

^{1 6} Ves. 278.

² Statement abridged. Only so much of the report is given as relates to a single point. — ED.

heading in large print, "The following agreement has been entered into," was a paragraph in smaller print than the rest of the prospectus, purporting to give particulars of an agreement dated Feb. 5, 1897, (for the sale of certain patents by the Coria Syndicate, Limited, to the defendant company) — and then continuing thus: "There may be other agreements as to the formation of the company, the subscription to the capital, or otherwise, to none of which is the company a party, and which may technically fall within s. 38 of the Companies Act, 1867. Subscribers will be held to have had notice of all these contracts and to have waived all right to be supplied with particulars of such contracts, and to have agreed with the company, as trustees for the directors and other persons liable, not to make any claims whatsoever or to take any proceedings under the said section, or otherwise in respect of any non-compliance therewith."

Plaintiff received a copy of the prospectus; and, on the faith of it, he applied, Feb. 15, 1897, for 1000 shares in the company, by filling up and signing a printed application form, part of which was as follows: . . . "I beg to apply for 1000\(left\). ordinary shares, . . . on the terms of the prospectus. . . . I further agree with the company, as trustee for the directors and others liable, to waive any claims I may have against them for non-compliance in the said prospectus with s. 38 of the Companies Act, 1867, or otherwise. . . ." The 1000 shares were duly allotted to the plaintiff, and he paid the full amount of 1000\(lambda\), thereon.

Plaintiff subsequently discovered that an agreement had been entered into, on Dec. 3, 1896, between T. H. Lambert, on the one hand, and the Coria Syndicate, Limited — who were ultimately the ostensible vendors to the defendant company — on the other; whereby it was agreed that the syndicate should purchase a number of leather tire patents from one Lembeke, alleged to be a nominee or agent of T. H. Lambert, on the terms of allotting half of its share capital to Lembeke, and the other half, less the seven statutory shares allotted to the subscribers to the syndicate's memorandum of association, to T. H. Lambert; who thus on the ultimate sale to the defendant company acquired a substantial interest in it.

On making this and other discoveries, plaintiff, on Oct. 1, 1897, repudiated his shares and demanded repayment. On the company denying his right to repudiate, he began the present action.

Kekewich, J., after trial, gave judgment, that, as against T. H. Lambert, the prospectus was to be deemed fraudulent under s. 38 of the Companies Act, 1867; and that T. H. Lambert should, in default of payment by the defendant company, pay to the plaintiff the said sum of 1000l.

The defendants appealed. [The argument in behalf of the other defendants is omitted.]

E. Ford, for T. H. Lambert.

••• The question, then, is whether he is liable under s. 38, for nondisclosure of that agreement [of Dec. 3, 1896.] I submit that the waiver clause in the prospectus, and also in the application for shares, debars the plaintiff from relying on the section.

[Romer, L. J. Your contention then is that, no matter how fraudulent a contract may be, there is nothing in the Act to prevent a share-

holder from contracting himself out of the Act.].

[Lindley, M. R. Suppose this is a fraudulent prospectus as against the Company and you the promoter, the entire prospectus is a fraud including this waiver clause. What then becomes of the waiver?]

There is no enactment in the Act that a shareholder shall not contract himself out of it.

[Romer, L. J. Assume that there was a contract by the plaintiff not to take advantage of the Act, how can you bind him when you state in your prospectus that there "may be" other agreements when you knew there were? In your case you are a promoter knowing of this contract, and yet you put in a misleading statement that there "may be" other agreements. That, surely, is not a case in which you can say there is a waiver.]

I rely strongly on the waiver clause in the application form. To say that the plaintiff is not bound by that is to say that he may commit a breach of contract. After that contract he cannot turn round and say my client is liable. The allotment was made by the company upon the terms stated in the application form, and upon no other.

[Lindley, M. R. The expression in the application form, "or otherwise," is very significant. It covers a common law action of tort. It

means that the shareholder shall not sue on any ground at all.]

But the fact remains that the plaintiff has solemnly contracted himself out of this head of relief. Whether a company can put in a prospectus or application form a clause to protect itself, or whether a shareholder can contract himself out of the Act, has never yet been decided; but I submit that such a clause is not in itself unreasonable.

Warmington, Q. C., Renshaw, Q. C., and Norman Craig, for plaintiff. [Argument omitted.]

Cur. adv. vult.

LINDLEY, M. R. [After discussing other questions.] One part of the order, however, affects Mr. T. H. Lambert alone, and it raises a very important question as to the effect of what are called "waiver clauses" on s. 38 of the Companies Act, 1867. The prospectus in this case omitted all reference to an important contract of December 3, 1896, by which Mr. T. H. Lambert was to obtain considerable benefits. There can be no doubt that this contract ought to have been disclosed in the prospectus. Mr. T. H. Lambert has been held to have infringed this section, and an order has been made against him as to costs, of which he complains. The other directors apparently knew nothing of the contract in question, and no similar order was made

against them. Kekewich, J.'s view was that the waiver clause could not avail Mr. T. H. Lambert because the plaintiff was not sufficiently informed of what he was waiving. I am of the same opinion, but, as this matter is one of great importance, I will state my reasons for my conclusion.

The first part of s. 38 enacts that every prospectus of a company, and every notice inviting persons to subscribe for shares, shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice. The second part of the section enacts that every prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.

A prospectus, therefore, which does not comply with the first half of the section is to be deemed fraudulent, as between the persons issuing it, on the one hand, and all persons taking shares on the faith of it, on the other, except only in one case — namely, if they have notice of the contract, of which some particulars have to be given in compliance with the first part of the section.

Considering the manifest object of this section, which is to compel the persons issuing prospectuses to afford to persons invited to take shares the information required by the section, it is obvious that the words, "unless he shall have had notice of such contract," mean a great deal more than "unless he shall have some vague information which, if followed up, will lead to such notice." Notice in the section means, not what is called "constructive notice," but actual notice, that is, notice which brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly, and in a business sense, amounts to notice of a contract. Any other construction would render the section perfectly useless. Again, what is to be deemed fraudulent is the prospectus as a whole. It may contain some true statements, but the introduction of these will not save the prospectus from being deemed fraudulent as a whole. The introduction into the prospectus of a tricky waiver clause, instead of preventing the prospectus from being deemed fraudulent, affords an additional reason for holding it to be so in fact.

The waiver clause in the prospectus of this company is, in my opinion, clearly tricky and fraudulent on the part of Mr. T. H. Lambert. It is printed in small type, so as to escape attention; it is worded so as to conceal, and not to afford notice of, the contract of December 3, 1896, to which he, the promoter, was a party. The language, "there may be contracts which perhaps ought to be referred to," when it was perfectly well known, to Mr. T. H. Lambert at all events, that there certainly was one which ought to have been disclosed, stamps the clause as tricky and dishonest, so far as he is concerned.

But then it is said that the application for shares contains another waiver clause. But the application for shares refers to the prospectus, and was sent out with it, and the waiver clause in the application for shares is as tricky as the other, and is even worse by reason of the words "or otherwise," which increases its scope beyond all reasonable bounds. Literally construed, it would, if effect were given to it, afford a defence to the whole action. If a company's prospectus is fraudulent at common law, or is to be deemed fraudulent under s. 38 of the Companies Act, 1867, and an applicant for shares signs a contract which is intended to deprive him of his right to redress, he is not bound in equity by what he signs, unless his attention is called to the existence of facts which render the prospectus fraudulent. The introduction of a stipulation that an applicant for shares is to be deemed to have notice of what is in fact concealed from him, is simply part of the trick had recourse to in order to evade the consequences of the improper concealment. Such a stipulation in a tricky waiver clause like the one before us affords no protection to the person who seeks protection from it. The principle of refusing to give effect to parts of documents so as to prevent successful deception by means of them is quite familiar in its application to general words in releases, and to catching conditions of sale. The refusal is based on ordinary principles of honesty, and is as applicable to tricky waiver clauses as to other tricky documents.

I wish to guard myself against being supposed to go further than I intend. I have no doubt that a person who takes shares on the faith of a contract which is fraudulent at common law, or which is deemed to be fraudulent under s. 38 of the Companies Act, 1867, may elect to keep his shares, and may agree not to enforce his right to damages. But, in order to bind him by election or agreement, he must be fairly dealt with; and his attention must be fairly drawn to the facts, or at all events the existence of facts, which confer the rights which he elects or agrees not to enforce. If his attention, instead of being drawn to such facts, is drawn from them, the attempt to catch him will fail.

I am aware that, owing to the wide language of s. 38, there is sometimes practical difficulty in determining whether all contracts which apparently come within it are really such as to require notice in a prospectus; and to put in a long list of contracts, which no applicant for shares would care to know anything about, would frighten the public and do no good to any one. These difficulties have given rise to honest attempts to protect honest men by waiver clauses from the consequences of honest unintentional breaches of the law. General waiver clauses in prospectuses, applications for shares, articles of association, or other documents addressed to large numbers of persons are, however, always suspicious, and require careful scrutiny. When the Court has to deal with an honest case of the sort above mentioned, the Court will, I have no doubt, be able to come to a just conclusion, and will, if necessary, uphold the clause. On the present occasion we have no

such case to deal with. Mr. T. H. Lambert, the promoter, has ingeniously endeavored to shield himself from the consequences of concealing a contract to which he dared not allude, and his appeal, like the others, must be dismissed with costs.

[SIR F. H. JEUNE and ROMER, L. J., concurred; the latter delivering an opinion upon another branch of the case.]

Appeal dismissed.

Mcelhenny's Appeal.

1869. 61 Pennsylvania State, 188.1

Bill filed by Hubert Oil Company against the administrators of McElhenny's estate.

McElhenny purchased land, probably at a cost of much less than \$12,000. This land he sold to Baird and others; upon their agreement that he should receive \$12,000; and should also receive a share of the profits to be made by the purchasers from him, in case they put it into a company at the sum of \$40,000. Baird et als. then promoted the formation of the plaintiff corporation. Stock was subscribed to the amount of more than \$40,000; McElhenny's name appearing as a subscriber to the extent of \$2000. The promoters sold the land to the corporation for \$40,000. Out of this sum McElhenny was paid the \$12,000, due from Baird et als. as purchase money. The balance of \$28,000 was divided as profit among the promoters; McElhenny receiving as his share the sum of \$2083.84. The sale to the corporation was made under such circumstances that the promoter-vendors were compellable to refund to the corporation the profit they received.

The corporation claimed that McElhenny should account to it for the profit received by McElhenny on the sale which he made to Baird et als., as well as the profit received by McElhenny on the sale by Baird et als. to the corporation. The court below, apparently adopting this basis, decreed that the administrators should pay to the corporation the sum of \$9083.84.

From this decree, the administrators appealed.

T. Archer, Jr. (L. C. Cassidy with him), for appellants.

E. S. Miller (C. B. Penrose with him), for appellees.

THOMPSON C. J.

In order to bring the intestate's estate into liability to the company for money received by him in payment for the land, it must be made to appear that he occupied some fiduciary relation to it, so that

¹ Statement abridged. Arguments and part of opinion omitted. - ED.

the receipt of the money, although received by him for his own use, was, by means of the fraud practised in his fiduciary relation, money of the company. It is not damages in a case like this that equity gives, it is restoration of the thing wrongfully taken, viz. the money received, or an equal sum and interest.

It nowhere appears that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co. and others, although he bought it to sell again, no doubt.

If the property was not purchased by McElhenny for the use and as agent of the company, but for his own use (and this is the proof in the case), he might sell it at a profit most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profits made on his sale. The parties to whom he sold have never asked him to account to them for the profit at which he sold to them. They have not pretended that he was their agent in making the purchase, and I am unable to understand the ground of a right in the company to demand it. The difference between the sum he paid and that at which he sold, he was as fairly entitled to as to the sum paid. Seeing no evidence of agency, or of a trust, or a fiduciary relation between the plaintiff and the defendant's intestate thus far, we are of opinion that there was error in decreeing payment of any portion of the profits made by him in the sale to the promoters of the Hubert Oil Co.; and to the extent of \$7000 the decree is to be modified.

At this point another inquiry arises, is the estate of McElhenny liable in equity to refund to the company the share of the profits received by him over the sum of \$12,000? We are inclined to think it is.

After selling to Baird, Boyd and others, and then joining them in selling to the company, he assumed their position and liabilities, and if they could not make a profit, he could not.

[Decree against McElhenny's estate for \$2083.84.] Sharswood, J., dissented.

KELNER v. BAXTER.

1866. Law Reports, 2 Common Pleas, 174.1

THE declaration was for goods sold and delivered, goods bargained and sold, interest, and upon accounts stated.

[Pleas omitted.]

At the trial before Erle, C. J., at the sittings in London after last Trinity Term, the following facts appeared in evidence: - The plaintiff was a wine merchant, and the proprietor of the Assembly Rooms at Gravesend. In August, 1865, it was proposed that a company should be formed for establishing a joint-stock hotel company at Gravesend, to be called The Gravesend Royal Alexandra Hotel Company, Limited, of which the following gentlemen were to be the directors, viz., Mr. L. Calisher, Mr. T. H. Edmands, Mr. M. Davis, Mr. Macdonald, Mr. Hulse, Mr. N. J. Calisher (one of the defendants), and the plaintiff. The plaintiff was to be the manager of the proposed company, and Mr. Dales (another of the defendants) was to be the permanent architect. One part of the scheme was that the company should purchase the premises of the plaintiff for a sum of 5000l., of which 3000l. was to be paid in cash, and 2000l. in paid up shares, the stock, &c., to be taken at a valuation; and this was carried into effect and completed, the other defendant (Baxter) being the nominal purchaser on behalf of the company. In December a prospectus was settled. On the 9th of January, 1866, a memorandum of association was executed by the plaintiff and the defendants and others.

Pending the negotiations the business had been carried on by the plaintiff, and for that purpose additional stock had been purchased by him; and on the 27th of January, 1866, an agreement was entered into for the transfer of this additional stock to the company, in the following terms:—

"January 27th, 1866.

"To John Dacier Baxter, Nathan Jacob Calisher, and John Dales, on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited.

"Gentlemen, — I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of 900*l*., payable on the 28th of February, 1866.

(Signed) "John Kelner."

Then followed a schedule of the stock of wines, &c., to be purchased, and at the end was written as follows:—

¹ Pleadings and arguments omitted. - ED.

"To Mr. John Kelner.

"Sir, — We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed.

(Signed) "J. D. Baxter,
"N. J. Calisher,
"J. Dales,

"On behalf of the Gravesend Royal Alexandra Hotel Company, Limited."

In pursuance of this agreement the goods in question were handed over to the company, and consumed by them in the business of the hotel; and on the 1st of February a meeting of the directors took place, at which the following resolution was passed: "That the arrangement entered into by Messrs. Calisher, Dales, and Baxter, on behalf of the company, for the purchase of the additional stock on the premises, as per list taken by Mr. Bright, the secretary, and pointed out by Mr. Kelner, amounting to 900%, be, and the same is hereby ratified." There was also a subsequent ratification by the company, viz., on the 11th of April, but this was after the commencement of the action.

The articles of association of the company were duly stamped on the 13th of February, and on the 20th the company obtained a certificate of incorporation under the 25 & 26 Vict. c. 89.

The company having collapsed, the present action was brought against the defendants upon the agreement of the 27th of January.

On the part of the defendants oral evidence was tendered for the purpose of showing that it never was intended that they should be personally liable; but his Lordship rejected it. It was then submitted that, inasmuch as the agreement was not entered into by the defendants personally, but only as agents for the hotel company, they thereby incurred no personal obligation to the plaintiff, who was himself one of the promoters.

For the plaintiff it was insisted that, there being no company in existence at the time of the agreement, the parties thereto had rendered themselves personally liable; and that there could be no ratification of the contract by a subsequently created company.

A verdict was taken for the plaintiff for 900*l*, subject to leave reserved to the defendants (upon giving security) to move to enter a nonsuit, on the ground that the agreement of the 27th of January did not make them personally liable.

Nov. 6, 1866. Seymour, Q. C., obtained a rule nisi accordingly, and also for a new trial on the ground of misdirection on the part of the learned judge, "in not allowing witnesses to be called to contradict the plaintiff as to the defendants' personal liability."

J. Brown, Q. C., and Thesiger, shewed cause.

Seymour, Q. C., in support of the rule.

ERLE, C. J. I am of opinion that this rule should be discharged. The action is for the price of goods sold and delivered: and the ques-

tion is whether the goods were delivered to the defendants under a\ contract of sale. The alleged contract is in writing, and commences with a proposal addressed to the defendants, in these words: -- "I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of 900l., payable on the 28th day of February, 1866." Nothing can be more distinct than this as a vendor proposing to sell. It is signed by the plaintiff, and is followed by a schedule of the stock to be purchased. Then comes the other part of the agreement, signed by the defendants in these words, - "Sir, We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed." If it had rested there, no one could doubt that there was a distinct proposal by the vendor to sell, accepted by the purchasers. A difficulty has arisen because the plaintiff has at the head of the paper addressed it to the defendants, "on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited," and the defendants have repeated those words after their signatures to the document; and the question is, whether this constitutes any ambiguity on the face of the agreement, or prevents the defendants from being bound by it. I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made. The history of this company makes this construction to my mind perfectly clear. It was no doubt the notion of all the parties that success was certain: but the plaintiff parted with his stock upon the faith of the defendants' engagement that the price agreed on should be paid on the day named. It cannot be supposed that he for a moment contemplated that the payment was to be contingent on the formation of the company by the 28th of February. The paper

expresses in terms a contract to buy. And it is a cardinal rule that no ora evidence shall be admitted to shew an intention different from that which appears on the face of the writing. I come, therefore, to the conclusion that the defendants, having no principal who was bound originally, or who could become so by a subsequent ratification, were themselves bound, and that the oral evidence offered is not admissible to contradict the written contract.

WILLES, J. I am of the same opinion. Evidence was clearly inadmissible to shew that the parties contemplated that the liability on this contract should rest upon the company and not upon the persons contracting on behalf of the proposed company. The utmost it could amount to is, that both parties were satisfied at the time that all would go smoothly, and consequently that no liability would ensue to the defendants. The contract is, in substance, this, — "I, the plaintiff, agree to sell to you, the defendants, on behalf of the Gravesend Royal Alexandra Hotel Company, my stock of wines;" and, "We, the defendants, have received your offer, and agree to and accept the terms proposed; and you shall be paid on the 28th of February next." Who is to pay? The company, if it should be formed. But, if the company should not be formed, who is to pay? That is tested by the fact of the immediate delivery of the subject of sale. If payment was not made by the company, it must, if by anybody, be by the defendants. That brings one to consider whether the company could be legally liable. I apprehend the company could only become liable upon a new contract. It would require the assent of the plaintiff to discharge the defendants. Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done, - by a person in existence either actually or in contemplation of law; as in the case of assignees of bankrupts and administrators, whose title, for the protection of the estate, vests by relation. The case of an executor requires no such ratification, inasmuch as he takes from the will. It is unnecessary, however, to pursue this further. In addition to the cases cited at the bar, I would refer to Gunn v. London and Lancashire Fire Insurance Company,1 where this Court, upon the authority of Payne v. New South Wales Coal and International Steam Navigation Company, held that a contract made between the projector and the directors of a joint-stock company provisionally registered, but not in terms made conditional on the completion of the company, was not binding upon the subsequent completely registered company, although ratified and confirmed by the deed of settlement: and Williams, J., said, that, "to make a contract valid, there must be parties existing at the time who are capable of contracting." That is an authority of extreme importance upon this point; and, if ever there could be a ratification, it was in that case. Both upon principle and upon authority, therefore, it seems to me that the company never could be liable upon this contract: and,

as was put by my Lord, construing this document ut res magis valeat quam pereat, we must assume that the parties contemplated that the persons signing it would be personally liable. Putting in the words "on behalf of the Gravesend Royal Alexandra Hotel Company," would operate no more than if a person should contract for a quantity of corn "on behalf of my horses." As to the suggestion that there should have been a special count, that is quite a mistake. There need not be a special count unless there was a person existing at the time the contract was made who might have been principal. The common count perfectly well represents the character of the liability which these defendants incurred. It is quite out of the question to suppose that there was any mistake. The document represents the real transaction between the parties. I think that the course taken at the trial was perfectly correct, and that the rule should be discharged.

Byles, J. I am of the same opinion. At first, I must confess, I entertained some doubt, the contract appearing on the face of it to have been entered into by the defendants on behalf of the company. The true rule, however, is that stated by Mr. Thesiger, viz., that persons who contract as agents are generally personally responsible where there is no other person who is responsible as principal. Suppose this company never came into existence at all, could it be doubted that these defendants must be held to have bound themselves personally? Then, was it contemplated that the liability was conditional only until the company should be formed? It is said that the contract was ratified by the company after it came into existence. There could, however, be no ratification. Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur: but the ratification must be by an existing person, on whose behalf the contract might have been made at the time. That could not be so here: a subsequent ratification by the company could only be with the assent of the plaintiff; and then it would be a new contract. Mr. Seymour contended that the contract might amount to a personal undertaking on the part of the defendants that the company shall pay. That would make them equally liable. Any objection on the score of the Statute of Frauds would be cured by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. In no way, therefore, in which it can be put, could the company become responsible.

[The concurring opinion of Keating, J., is omitted.]

Rule discharged.

LANDMAN v. ENTWISTLE.

1852. 7 Exchequer, 632.1

Assumestr to recover 6161. 18s. 4d., claimed by plaintiff for his services as the engineer of a projected railway, called the Kentish Railway Company, of which the defendant was one of the provisional committee.

At a meeting of the provisional committee, on Aug. 12, 1844, at which plaintiff was present, one of the resolutions was:—"That the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the Company, and that no such responsibility shall attach to them." Another of the resolutions at the same meeting was:—"That it be a recommendation to the committee of management to endeavour to secure the valuable services of J. Locke, Esq., the eminent engineer, in addition to those of Colonel Landman, the original projector of the railway, it being clearly understood that neither of those gentlemen shall have any personal claim against any member of the provisional committee."

Oct. 11, 1844, plaintiff wrote to the solicitors of the Company:—
"I never understood that, unless the project were successful, the engineers were to abandon all claim; but I did understand that the individuals comprising the committee were not to be held personally liable. I am perfectly ready to continue to devote my time and attention to the perfecting of the survey and getting up of the parliamentary documents, without making any charge for the same until sufficient funds may have been collected."

At a meeting of the committee of management, on Oct. 17, 1844, at which plaintiff was present, it was "Resolved, that Messrs. Lake & Co. be requested to forward the survey in such manner as may be found advisable, Colonel Landman [the plaintiff] stating that he would render every assistance in his power, and that he would make no claim for his personal services, or for those of his assistant, Mr. Pinhorn, until there should be sufficient funds of the Company to meet any demand he might be entitled to make."

At a meeting of the committee of management on Oct. 29, 1844, one of the resolutions was as follows: "And it appearing to the committee that it is absolutely necessary to provide a fund, in order that the surveys of the line may be immediately proceeded with, it was (on the motion of Mr. Entwistle) — Resolved, that the committee bind themselves to be answerable to the extent of 1000l, to be applied to engineering and surveying purposes."

At a meeting, on Nov. 18, 1844, the committee resolved, that it is expedient that the Kentish Railway Company should withdraw from

¹ Statement abridged. Arguments omitted. - ED.

this undertaking in favour of the South Eastern Railway Company. The resolution recited that there was an engagement by the South Eastern R. Co. "to reimburse to this committee the expenses hitherto incurred."

The scheme was thereupon abandoned, and the deposits on shares, which amounted to 4168*l*. were returned to the subscribers.

At the trial, after the foregoing facts had been proved, *Pollock*, C. B., directed a nonsuit, reserving leave for the plaintiff to enter a verdict for him, if the Court should be of opinion that he was entitled to recover.

A rule nisi having been obtained accordingly, the Attorney General (Hoggins and Smythies with him) showed cause.

Sir A. Cockburn, Bramwell, and Wilkinson supported the rule.

Parke, B. The rule must be discharged. It is clear that the plaintiff undertook to do the work, not upon a contract with the provisional committee, but looking to the chance of the scheme succeeding, and of there being funds available for the payment of his claim. The plaintiff's letter, of the 11th of October, shews that there was no contract on the part of the provisional committee that he should be paid at all events. In the majority of cases of this kind, the contract is that the party shall look only to the funds of the Company, and not to the responsibility of the individuals who manage it.

PLATT, B. I am of the same opinion. This action cannot be maintained, unless there was a personal responsibility on the part of the defendant to pay the plaintiff. But, by the resolution of the 12th of August, the provisional committee distinctly repudiate any personal liability; and it appears from the resolution of the 17th of October, that the plaintiff agreed to make no claim for his services "until there should be sufficient funds of the Company to meet any demand he might be entitled to make." That must surely mean sufficient funds of that description which the committee could properly apply in satisfaction of the plaintiff's claim. Now, the sum of 4168L. which consisted of deposits, was not a fund of that description; for, on the abandonment of the scheme, all the depositors were entitled to call for repayment of their deposits, the consideration upon which their duty to pay was founded being at an end. The sum in question, therefore, was not available in satisfaction of the plaintiff's demand, and there were no funds out of which he was entitled to be paid.

Martin, B. I am of the same opinion. The case has been put to us much in the same way that a counsel puts a case to a jury. He tells them that the plaintiff has done the work, and that he is entitled to be paid for it; and laying aside the documents upon which the contract is founded, he calls upon the jury, and frequently with success, to infer a contract which renders the defendant liable. The answer is, that the true contract between the parties must be looked at for the purpose of ascertaining with whom the liability

rests. Now, in this case, was there any obligation on the part of the provisional committee to go on with the scheme? There certainly was not. They were at liberty in that respect to act as they pleased, and the engineer had no right to compel them to go on. He took the chance of payment provided the scheme succeeded, in which case he would no doubt have been paid out of the profits.

Pollock, C. B. I agree with the rest of the Court that there is no foundation for setting aside the nonsuit.

Rule discharged.

McARTHUR v. TIMES PRINTING CO.

1892. 48 Minnesota, 319.

APPEAL by defendant, Times Printing Company, from an order of the district court of Hennepin county, *Canty*, J., made August 4, 1891, denying its motion for a new trial.

Action brought by D. A. McArthur to recover damages sustained by him from the breach of a contract made by defendant with him. He was employed by it for a year from October 1, 1889, to solicit advertisements for its newspaper, and was to receive \$20 a week during October, and \$30 a week for the residue of the year, and was also to receive, at the end of the year, five shares of its stock, of \$100 each. He was discharged April 12, 1890. After the year expired he brought this suit. It was tried May 5, 1891, and plaintiff had a verdict for \$450. Defendant moved for a new trial. The motion was denied, and it appealed.

Geo. F. Edwards, for appellant.

F. B. Wright, for respondent.

MITCHELL, J. The complaint alleges that about October 1, 1889, the defendant contracted with plaintiff for his services as advertising solicitor for one year; that in April, 1890, it discharged him, in violation of the contract. The action is to recover damages for the breach of the contract. The answer sets up two defenses: (1) That plaintiff's employment was not for any stated time, but only from week to week; (2) that he was discharged for good cause. Upon the trial there was evidence reasonably tending to prove that in September, 1889, one C. A. Nimocks and others were engaged as promoters in procuring the organization of the defendant company to publish a newspaper; that, about September 12th, Nimocks, as such promoter, made a contract with plaintiff, in behalf of the contemplated company, for his services as advertising solicitor for the period of one year from and after October 1st, - the date at which it was expected that the company would be organized; that the corporation was not, in fact, organized until October 16th, but that the publication of the paper was commenced by the promoters October

1st, at which date plaintiff, in pursuance of his arrangement with Nimocks, entered upon the discharge of his duties as advertising solicitor for the paper; that after the organization of the company he continued in its employment in the same capacity until discharged, the following April; that defendant's board of directors never took any formal action with reference to the contract made in its behalf by Nimocks, but all of the stockholders, directors, and officers of the corporation knew of this contract at the time of its organization, or were informed of it soon afterwards, and none of them objected to or repudiated it, but, on the contrary, retained plaintiff in the employment of the company without any other or new contract as to his services.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. Abbott v. Hapgood, 150 Mass. 248, (22 N. E. Rep. 907;) Beach, Corp. § 198. This, however, seems to be more a question of name than of substance; that is, whether the liability of the corporation, in such cases, is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This, court, in accordance with what we deem sound reason, as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts. And this it may do precisely as it might make similar original contracts; formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract. That it is not requisite that such adoption or acceptance be expressed, but it may be inferred from acts or acquiescence on part of the corporation, or its authorized agents, as any similar original contract might be shown. Battelle v. Northwestern Cement & Concrete Pavement Co., 37 Minn. 89, (33 N. W. Rep. 327.) See, also, Mor. Corp. § 548. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course, the agreement must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is very clear; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the statute of frauds, because, "by its terms, not to be performed within one year from the making thereof," which counsel assumes to be September 12th, — the date of the agreement between plaintiff and the promoter. This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification, which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed "ratification," yet a "ratification," properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. In re Empress Engineering Co., 16 Ch. Div. 128; Melhado v. Porto Alegre, N. H. & B. Ry. Co., L. R. 9 C. P. 505; Kelner v. Baxter, L. R. 2 C. P. 185. What is called "adoption," in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed; and the evidence justified the verdict.

The point is made that plaintiff should have alleged that the contract was made with Nimocks, and subsequently adopted by the defendant. If we are correct in what we have said as to the legal effect of the adoption by the corporation of a contract made by a promoter in its behalf before its organization, the plaintiff properly pleaded the contract as having been made with the defendant. But we do not find that the evidence was objected to on the ground of variance between it and the complaint. The assignments of error are very numerous, but what has been already said covers all that are entitled to any special notice.

Order affirmed.

IN RE EMPRESS ENGINEERING CO.

1880. Law Reports, 16 Chancery Division, 125.1

APPEAL from Vice-Chancellor of Court of Chancery of the County Palatine of Lancaster.

By an agreement, dated May 2, 1879, between G and A on the one part, and C, for and on behalf of a company intended to be registered as a limited company and to be called "The Empress Engineering Company," of the other part, it was agreed that the company should

¹ Statement abridged. Argument and part of opinions omitted. -- ED.

purchase of G and A certain property; and also that sixty guineas should be paid by the company to Jones & Pride, solicitors, for the incorporation thereof, such sum to include the preparation of the necessary documents and certain expenses.

The company was incorporated under a memorandum of association, dated May 9, which adopted said agreement. The directors, on June 23, 1879, ratified the agreement.

Dec. 10, 1879, an order was made for winding up the company. Jones & Pride made a claim for the amount of the above-mentioned £63. The claim was disallowed, and they appealed.

Snow, for appellants.

[After arguing other points.] If the court is against me on that ground, I submit that the claimants can make out their case on the principle of In re Hereford and South Wales Waggon and Engineering Company, L. R. 2 Chan. Div. 621, where it was held that there was a good equitable claim for services rendered before the formation of the company, of which the company had the benefit.

[James, L. J.: — The question has never been tried whether the

company has had the benefit of the claimant's services.

JESSEL, M. R.: — That is a question of quantum meruit, and the subject for a distinct application.]

Gazdar, for the liquidator, was not called upon.

Jessel, M. R. I must say that I do not see how it was possible for the Vice-Chancellor to have decided otherwise than he did. The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence, nor could it become binding on the company by ratification, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle. I am of opinion, therefore, that there was no contract binding the company to pay this £63 to Messrs. Jones & Pride.

Supposing, however, that there was, it is then contended that a mere contract between two parties that one of them shall pay a certain sum to a third person, not a party to the contract, will make that third person a *cestui que trust*. As a general rule that will not be so. . . .

There is another ground suggested, namely, that as the company has had the benefit of the registration they ought to pay for it. But the answer to that is this — that was not the claim brought forward. The claim brought forward was for an agreed sum of £63, and any order we make (I do not know whether it is necessary to express it)

will not prejudice that claim, which is merely for an amount due for services the benefit of which has been taken by the company.

JAMES, L. J.

The only thing that results from what is called ratification or adoption of such a contract is not the ratification or adoption of a contract qua contract, but the creation of an equitable liability depending upon equitable grounds. It is inequitable for a man not to pay for the services of which he has taken the benefit. . . .

Brett, L. J. concurred.

James, L. J. The appeal will be dismissed with costs. It will be without prejudice to any equitable claim on a quantum meruit. . . .

WEATHERFORD, &c. R. CO. v. GRANGER.

1894. 86 Texas, 351.1

GAINES, Associate Justice. This suit was brought by the defendant in error against the plaintiff in error to recover upon open account for services rendered. The plaintiff in the trial court obtained a judgment, which was affirmed by the Court of Civil Appeals. This writ of error is sued out for the purpose of reversing that judgment.

The plaintiff in error, the defendant in the trial court, is a corporation, organized under the general law of the State for the purpose of constructing and operating a railroad. The defendant in error, the plaintiff in the trial court, is a practising attorney at law. The services for which a recovery was sought were for aiding to raise a bonus and for legal advice and assistance, and were rendered both before and after the filing with the Secretary of State the company's articles of incorporation.

The testimony, as shown by the statement of facts, in so far as it bears upon the question before the court, is in substance as follows:

The plaintiff testified, that in March, 1889, he was employed by one Anderson to assist in raising a bonus for the defendant company, and "agreed that the said company would pay him well for his services;" that Anderson was a promoter of the corporation, and represented himself as its general manager, and employed plaintiff not only to assist in procuring the bonus, but to attend to all the company's business as its attorney; that in September, 1889, Anderson allowed his account, and was at that time the owner of a majority of the stock, which he subsequently transferred to one Stone, the president of the company, and his associates.

Stone testified, on behalf of the company, that in the spring of 1889, in Kansas City, Missouri, he employed Anderson to go to

1 Arguments omitted. - ED.

Weatherford, and to procure a bonus of \$40,000 and survey the right of way for a railroad from that city to Mineral Wells, and to pay him \$1000 for his services; that he had paid Anderson according to his agreement; that he did not know that Anderson had ever employed plaintiff for any purpose; that Anderson was never general manager for the company, and held no office in it except that of director; that he knew that the plaintiff was interesting himself in procuring the bonus, but supposed he was working for one Johnson, who was one of the charter members, and who owned certain coal lands which he wished to sell to the projectors of the railroad; that plaintiff never said anything to him about the company owing him anything, and that the first he knew of plaintiff's claim was when this suit was brought.

There was further testimony tending to show, that Anderson was the chief active promoter of the enterprise, and that he had the principal management of the business from its inception in March until he retired in September, 1889; and that during this time the plaintiff was frequently in attendance upon him, aiding and assisting him in procuring the bonus, and otherwise promoting the objects of the company.

No controversy is raised in this court as to the fact of plaintiff's services, or as to their value.

The trial judge, as conclusions of fact, found, in substance, that some kind of a company was formed to build the railway from Weatherford to Mineral Wells; that Anderson was "the principal mover in said scheme, and was so recognized by all parties;" that he employed plaintiff to assist him in procuring a bonus and in otherwise advancing the enterprise, and that the plaintiff rendered service under said employment, both before and after the articles of the company were filed; that the bonus was raised, and was, after its incorporation, accepted by said company.

The Court of Civil Appeals adopt the findings of the trial judge, and add additional findings as follows: "The charter of the defendant company was signed and acknowledged about June 1, 1889, and was filed in the office of the Secretary of State at Austin, July 2, 1889. The bonus or subsidy was not secured until after the filing of the charter. The record would have justified the trial court, and so justifies us, in finding, as we do, the fact to be, that in availing itself of the subsidy secured, the company knew of the services of the plaintiff in raising the bonus."

Under the statute, the corporation came into existence when its articles of incorporation were filed in the office of Secretary of State. Rev. Stats., arts. 4104, 4105. Although the trial court found that the services for which plaintiff sued were rendered in part before and in part after the filing of the articles, their value was assessed as an entirety at \$500, and judgment was rendered for the whole amount. In this there was error. We are of opinion, that under the

circumstances of this case, as shown by the evidence, the defendant corporation can not be held liable to the plaintiff for any services rendered by him before it was brought into legal existence.

Upon the question as to the liability of a corporation growing out of contracts made on its behalf by its promoters, there is considerable diversity and some conflict of opinion. But there are some propositions affecting this question upon which the authorities seem to be in substantial accord. A promoter, though he purport to act on behalf of the projected corporation, and not for himself, can not be treated as agent, because the nominal principal is not then in existence; and hence when there is nothing more than a contract by a promoter, in which he undertakes to bind the future corporation, it is generally conceded that it can not be enforced. Kelner v. Baxter, L. R., 2 Com. Pl., 174; Melhado v. Railway, L. R., 9 Com. Pl., 503.

The promoters themselves are liable upon the contract, unless the person with whom they engage agrees to look to some other fund for payment. *Kerridge* v. *Hesse*, 9 Carr. & P., 200.

The statute, however, which authorizes the incorporation may provide that the corporation, when formed, shall pay the necessary expenses of promoting the scheme; in such a case, though the right of action is dependent upon the contract, the liability is created by the statute. Re Rotherham, etc., Co., L. T. Rep., N. S., 217.

It is now held in England, that although the articles of association bind the company to pay the expenses of its promotion, a third party can not avail himself of such a provision so as to maintain an action against the company. Re Rotherham, etc., Co., supra; Eley v. Assurance Co., 34 L. T. Rep., N. S., 190.

It is also generally held, that contracts by promoters made on behalf of the corporation, within the scope of its general authority, may be adopted by the latter after its organization. Some of the courts say they may be ratified; but ratification presupposes a principal existing at the time of the agent's action, and it seems to us, therefore, that the term is not applicable in its technical sense. McArthur v. Printing Co., 51 N. W. Rep., 215; Spiller v. Paris Skating Rink Co., 7 Ch. Div., 368.

With the exception of the law courts of England, the rule is also very generally recognized, that if a contract be made on behalf of a corporation by its promoters, and the corporation, after its organization, with a knowledge of the facts, accept its benefits, it must take it with its burdens; and if the other party has performed the stipulation binding upon him, it may be enforced as against the corporation. Spiller v. Rink Co., supra; Loucke v. Warehousing Co., 6 Ch., 67.

But as to the application of the rule last announced, the courts differ in opinion. A leading case upon this subject is *Edwards* v. *Grand Junction Railway Company*, 1 Milne & Cr., 650. There the promoters of the railway company had entered into a contract with the trustees of a turnpike company, in which the latter agreed to with-

draw their opposition to an act of Parliament for the incorporation of the railway company, in consideration of an agreement by the promoters to insert certain clauses in the act as to the nature of the necessary constructions at the crossing of the railway and the turnpike road, and the opposition was withdrawn, but the clauses were not inserted; and it was held, that the railway company should be enjoined from constructing the crossing in a manner different from that specified in the clauses which had been agreed upon and had been omitted. The correctness of the ruling in this case was seriously questioned in the House of Lords in *Preston* v. *Railway*, 5 House of Lords, 605, and in *Caledonian Railway Co.* v. *Helensburg*, 2 McQueen, 391. Same case, 2 Jur., N. S., 695. We presume the doubt as to this case arises from the fact that the only benefit accepted by the defendant company was the exercise of the powers conferred upon it by the act of Parliament.

When the promoters of a railway company have agreed with a landed proprietor through whose estates the road is projected to run, to take the requisite quantity of his land at a stipulated price, and after the corporation is formed it takes the land, it is certainly equitable that the company should be made to pay the agreed compensation; and the doctrine is recognized in many English equity cases. Stanley v. Railway, 3 Milne & Cr., 773; Gooday v. Colchester Railway Co., L. R., 15 Eq., 596; Preston v. Liverpool Railway Co., L. R., 7 Eq., 124; Edwards v. Grand Junction Railway Co., 1 Milne & Cr., 650.

The same rule has been announced also in many American cases. Little Rock Railway Co. v. Perry, 37 Ark., 164; Paxton Cattle Co. v. Bank, 21 Neb., 621; Grape Sugar Co. v. Small, 40 Md., 395; Bommer v. Manufacturing Co., 81 N. Y., 468; Battelle v. Pavement Co., 37 Minu., 89; McArthur v. Printing Co., supra.

Having exercised rights and enjoyed benefits secured to it by the terms of a contract made by its promoters in its behalf, a corporation should be held estopped to deny its validity.

Again, when the promoters of a corporation have made a contract in its behalf, to be performed after it is organized, it may be deemed a continuing offer on part of the other party to the agreement, unless withdrawn by him, and may be accepted and adopted by the corporation after such organization; and the exercise of any right inconsistent with the nonexistence of such contract might be deemed conclusive evidence of such adoption.

But there are some cases which go a step further. Low v. Railway, 45 New Hampshire, 370, was a case of a Vermont corporation sued in New Hampshire upon a contract made in the former State. After a charter had been granted, but before an organization had been effected, a public meeting was held to promote the enterprise, at which, it is to be presumed from the opinion, the corporators were present or were represented. A proposition was made that the plain-

tiff should be employed and paid to visit various towns and cities to interest capital in the projected scheme, and to solicit and procure subscriptions. The plaintiff accepted the offer and performed the services, and it was held that the corporation was liable. The court determined that the question of liability depended upon the law of Vermont, as announced in the case of Hall v. Railway, 28 Vermont, 401. But they were also inclined strongly to think, that upon general principles the company, by accepting subscriptions which were procured by the plaintiff, bound itself to pay for his services. They also seem to recognize the doctrine, that after a charter has been granted a majority of the corporators have the power to make contracts necessary to perfect the organization, which may be binding upon the company when formed. But they also lay stress upon the fact that the charter of the defendant corporation provided, that "the expenses of all surveys and examinations, as also of the preliminary surveys already made and making, and all manner of incidental expenses relating thereto, shall be paid by said corporation."

In Hall v. Railway, supra, a corporator was held entitled to recover for necessary services in organizing the company, although there was no express promise by any one that he should be paid. Unless the charter of the company provided for the payment of such expenses, this decision we think is unsupported by authority.

It is generally held, that in the absence of such provision in the act of incorporation in case of a special charter, or in the general law or in the articles of incorporation under a general law, no implied promise can be imputed to a corporation to pay for the services of a corporator or promoter before the corporation comes into existence. A contract made by promoters may be adopted by a corporation, expressly or impliedly, by exercising rights under it; but otherwise it is not binding upon such corporation. Kelner v. Baxter, supra; Melhado v. Railway, supra; Railway v. Ketchum, 27 Conn., 170; Kerridge v. Hesse, 9 Carr. & P., 200; Munson v. Railway, 103 N. Y., 58; Morrison v. Mining Co., 52 Cal., 306; Gent v. Ins. Co., 107 Ill., 652; Railway v. Sage, 65 Ill., 328; Western, etc., Co. v. Cousley, 72 Ill., 531; Buffington v. Borden, 80 Wis., 635; see also, Railway v. Helensburg, 2 McQueen (H. of L.); same case, 2 Jur., N. S., 695; Teft v. Bank, 141 Pa., 550.

Now, when it is said that when a corporation accepts the benefit of a contract made by its promoters, it takes it *cum onere*, it is important to understand distinctly what is meant. There is, so far as this matter is concerned, a radical difference between a promise made on behalf of the future corporation in the contract itself, the benefits of which the corporation has accepted, and the promise in a previous contract to pay for services in procuring the latter to be made. This is well illustrated by the facts of the present case. Here a proposition was made on behalf of the company, by its promoters, that if a bonus should be subscribed and paid to it, it would build its road be-

tween certain points, and would carry coal at a certain stipulated rate. By accepting the bonus, the company became bound to fulfill the stipulations of that contract. That was the burden which it took with the benefit of the agreement. But it also appears that one of the promoters promised the plaintiff, that if he would assist in procuring subscribers to the bonus, the company would pay him for his services. This was no part of the contract the benefits of which were taken by the defendant.

The benefits of a contract are the advantages which result to either party from a performance by the other; and in like manner its burdens are such as its terms impose. A more accurate manner of stating the nature of the plaintiff's demand is to say, that the defendant has accepted the benefit of the plaintiff's services and should pay for them. It is true, in one sense, that the company has had the benefit of plaintiff's services, and it is equally true that it would have had that benefit if the services had been rendered under an employment by the subscribers to the bonus; and yet in the latter case it could not be claimed that the company would be liable for such services, unless payment for them by the company were made one of the terms of the contract between the company and the subscribers.

In Re Rotherham, etc., Company, 50 Law Times Reports, New Series, 219, in the opinion of one of the justices, this language is used: "It is said that Mr. Peace has an equity against the company, because the company had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say, that because a person gets the benefit of work done by somebody else, he is liable to pay the person who did the work."

There is more doubt as to the plaintiff's right to recover for his legal services in advising as to the articles of incorporation and in correcting and preparing this paper. Such services are usually necessary, and it would seem that the corporation should pay for them. Such payment is frequently provided for in the act of incorporation, or in the articles when the incorporation is effected under a general When such is the case, persons who take stock in the company are chargeable with notice that a liability for this purpose has already been created, and it is proper for the corporation to discharge it. But in the absence of such provision in the statute or in the articles, it may be unjust to shareholders to charge the corporation with liabilities of which they had no actual knowledge at the time they accepted the shares. We therefore hold, with some hesitation, that claims for the necessary expenses of the organization, under our statute, should not be excepted from the general rule applicable to contracts made before the corporation has come into legal existence.

Applying the rules we have announced to the case before us, it is apparent that the plaintiff has recovered, in part at least, for services

for which the defendant was not bound to pay. He made his contract before the company had a legal existence as a corporation, with a single promoter; and it is a matter of no moment that the promoter was the general manager of the project and became the owner of the majority of the stock upon its organization. There were other stockholders. The law requires that there should be ten at least. Rev. Stats., art. 4099.

The evidence does not disclose that his contract with Anderson was actually known to any other person; nor do we see any other circumstance from which knowledge should necessarily be inferred. Since Anderson had no power to bind the future corporation, but could bind himself, the inference from his assisting Anderson would be that he was acting gratuitously, or that Anderson had agreed to pay him.

Anderson was interested in shifting his contract upon the company; and it may be doubted whether, although he became a director, notice to him could be deemed notice to the company. The Court of Civil Appeals find, however, that the company had notice.

Waiving the question of the right of the court to supplement the finding of the trial judge under such evidence, and the further question whether there be any evidence to support this conclusion, it follows from what we have already said, that the question of the company's knowledge does not affect the case. The plaintiff's contract with Anderson, though made by the latter on behalf of the company, was not a lien, encumbrance, or burden upon the contract between the subscribers to the bonus and the defendant, and it incurred no liability on the former contract by accepting the benefit of the latter.

The evidence was sufficient to sustain a recovery by the plaintiff for the value of his services rendered after the corporation was created; but the court below failed to find separately the reasonable worth of such services. Therefore the entire judgment must be reversed.

We deem it proper to say, in conclusion, that if the opinion in the case of *McDonough* v. *Bank*, 34 Texas, 309, is to be construed as holding that merely by accepting the benefit of the plaintiff's labor, the defendant ratified and became bound under the promoter's contract, it does not meet our approval. Whether the contract in that case was one which the bank had the power to ratify, is to say the least a doubtful question; but it is one that does not concern us here, and upon which we express no opinion.

The judgments of the District Court and of the Court of Civil Appeals are reversed and the cause remanded.

Reversed and remanded.

CHAPTER VII.

INTERPRETATION OF CHARTERS.

DOWNING v. MOUNT WASHINGTON ROAD CO.

1860. 40 New Hampshire, 230.

Assumpsit, brought by Lewis Downing & Sons, to recover the price of eight omnibuses, and a model for the same, one light wagon, and one baggage wagon, made for the defendants, under a contract entered into by D. O. Macomber, president of the defendant corporation, in their behalf.

The light wagon was made and sent to one Cavis, the agent for building the road, and was used by him in making it. The omnibuses and baggage wagon were intended to be used in conveying passengers up and down the mountain, after the road was completed. The omnibuses were constructed in a peculiar way, and are not fit for use on ordinary roads.

By their act of incorporation, passed July 1, 1853, the corporation was empowered to lay out, make and keep in repair, a road from such point in the vicinity of Mt. Washington as they may deem most favorable, to the top of said mountain, &c., and thence to some point on the northwesterly side of said mountain, &c., to take tolls of passengers and for carriages, to build and own toll-houses, and to take land for their road.

The corporation was duly organized, and at a meeting of the directors on the 31st of August, 1853, before said contract was made, it was "voted that the president be the legal agent and commissioner of the company;" and his compensation as such was fixed.

"The president" was "directed to proceed with the letting of the work for the construction of the road," "the obtaining the right of way," and "what other action he shall deem proper, for the interests of the company," &c.

A committee was appointed "to settle in relation to the right of way, &c., and in relation to land on which to build stables and other buildings, for the use of the road, and also for building all such stables and houses as may be necessary for the operations of the company."

It appeared that by an additional act, passed July 12, 1856, the corporation were authorized "to erect and maintain, lease and dispose of any building or buildings, which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over said road."

The defendants denied the authority of Macomber to make such a contract in behalf of the corporation, and the power of the corporation under its charter either to authorize or enter into such a contract.

Kittredge & Bellows, for the plaintiffs. George & Foster, for the defendants.

Bell, C. J.¹ Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established. Trustees v. Peaslee, 15 N. H. 330; Perrine v. Chesapeake Canal Co., 9 How. 172. In giving a construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. Enfield Bridge v. Hartford R. R., 17 Conn. 454; Strauss v. Eagle Co., 5 Ohio (N. S.) 39.

If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.

In the present case the power to take the lands of others, and to take tolls of travelers, must be strictly construed, if doubts should arise on those points; but it is not seen that the other grants to the defendant corporation should not receive a fair and natural construction.

The charter of the Mount Washington Road empowers them to lay out, make and keep in repair, a road from Peabody River Valley to the top of Mount Washington, and thence to some point on the northwest side of the mountain. It grants tolls on passengers and carriages, and authorizes them to take lands of others for their road, and to build and own toll-houses, and erect gates, and appoint toll-gatherers to collect their tolls. The remaining provisions contain the ordinary powers of corporations, relating to directors, stock, dividends, meetings, &c. Laws of 1853, chapter 1486.

This charter confers the usual powers heretofore granted to turnpike corporations, and no others. The most natural and satisfactory mode of ascertaining what are the powers incidentally granted to such companies, is to inquire what powers have been usually exercised under them, without question by the public or by the corporators. It may be safely assumed that the powers which have not heretofore been found necessary, and have not been claimed or exercised under such charters, are not to be considered generally as incidentally granted.

¹ Bellows, J., did not sit.

Such charters have in former years been very common in this and other States, and they have not, so far as we are aware, been understood as authorizing the corporations to erect hotels, or to establish stage or transportation lines, to purchase horses or carriages, or to employ drivers in transporting passengers or freight over their roads; and no such powers have anywhere been claimed or exercised under them. We are, therefore, of opinion that the power to establish stage and transportation lines to and from the mountain, to purchase carriages and horses for the purpose of carrying on such a business, was not incidentally granted to the defendant corporation by their charter. State v. Commissioners, 3 Zab. 510.

But it is contended that the power to make this contract is conferred by the act in amendment of the charter, passed July 12, 1856. By this act the corporation may "erect and maintain, lease and dispose of any building or buildings which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over their said road." By their business, which the buildings to be erected were designed to accommodate, it is said the legislature must have intended some permanent and continuing business beyond that of merely building and maintaining a road; and that it could be no other than that of erecting a hotel on the mountain, and establishing lines of carriages, for the purpose of carrying visitors up and down the mountain.

But the foundation of this implication is very slight. The express grant is of an authority to erect, &c., buildings, not of all kinds, but such as may be found convenient for the accommodation of their business, and of travelers, &c. The business here referred to must be understood to be such as they are by their charter authorized to engage in. If nothing had been said of horses and travelers, there could hardly be any foundation for the idea that a hotel could have been contemplated by the legislature. Buildings suitable for the accommodation of their toll-gatherers and workmen employed on their road, would probably be thought every thing the legislature intended to authorize by this additional act. Connected as this authority now is with travelers, horses and carriages, there is scarce a pretence for argument, that this additional act goes any further than the original act, to authorize a stage and transportation company. unlikely that some of the projectors of this enterprise intended to secure much more extensive rights than those of a turnpike and hote! company, but it seems certain they have not exhibited this feature of their case to the legislature so distinctly as to secure their sanction, and the charter and its amendment as yet justifies them in no such claim.

The power of buying and selling real and personal property for the legitimate purposes of the corporation, and the power of contracting generally for the same purposes, within the limits prescribed by the charter, being granted, we understand the principle to be, that their

purchases, sales, and contracts generally, will be presumed to be made within the legitimate scope and purpose of the corporation, until the contrary appears, and that the burden of showing that any contract of a corporation is beyond its legitimate powers, rests on the party who objects to it. *Indiana* v. *Woram*, 6 Hill 37; *Ex parte Peru Iron Company*, 7 Cow. 540; *Farmer's Loan* v. *Clowes*, 3 Comst. 470; *Same* v. *Curtis*, 3 Seld. 466; *Biers* v. *Phenix Company*, 14 Barb. 358.

If a corporation attempt to enforce a contract made with them in a case beyond the legitimate limits of their corporate power, that fact being shown, will ordinarily constitute a perfect defence. Green v. Seymour, 3 Sandf. Ch. 285; Bangor Boom v. Whiting, 29 Me. 123; Life &c. Company v. Manufacturers &c. Company, 7 Wend. 31; New-York &c. Insurance Company v. Ely, 5 Conn. 560.

And if a suit is brought upon a contract alleged to be made by the corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail themselves of that defence. Beach v. Fulton Bank, 3 Wend. 573; Albert v. Savings Bank, 1 Md. Ch. Dec. 407; Abbot v. Baltimore &c. Company, 1 Md. Ch. Dec. 542; Strauss v. Eagle Insurance Company, 5 Ohio (N. S.) 59; Baron v. Mississippi Insurance Company, 31 Miss. 116; Bank of Genesee v. Patchin Bank, 3 Kern. 315; Gage v. Newmarket, 18 Q. B. 457.

The contract set up in this case was made not by the corporation itself, by a vote, nor by an agent expressly authorized to sign a contract already drawn, but it was made by the president of the corporation, acting under an appointment as their general agent; and it is argued that he was fully authorized by votes of the corporation to bind them by such a contract as the present; but it is not necessary to consider this question, as we think it settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. This principle is distinctly recognized in McCullough v. Moss, 5 Den. 567; overruling the case of Moss v. Rossie Lead Co., 5 Hill 137, and in Central Bank v. Empire Co., 26 Barb. 23; Bank of Genesee v. Patchin Bank, 3 Kern. 315.

The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. 5 Den. 567, above cited. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further.

This view seems to us entirely conclusive against the claim made for the omnibuses and model, and probably for the baggage wagon.

As to the light wagon, that may stand on a different ground. Such a wagon might be useful and necessary for the use of the agent of the company, in conducting the undoubted business of the corporation—the building and maintaining the road.

We are unable to assent to the position taken in the argument, that a ratification of part is a ratification of the whole contract. While the corporation may be restricted from ratifying a contract beyond the scope of the objects of the corporation, there could be no such objection as to any matter clearly within their power. The other contracting party might have a right to reject such ratification, claiming that the contract is entire, and if not ratified as such, it should not be made good for a part only. But if they claim the benefit of the partial ratification, the corporation can hardly object.

PROPRIETORS OF THE STOURBRIDGE CANAL v. WHEELEY.

1831. 2 Barnewall & Adolphus, 792.

This case was argued in the last term 1 by Sir James Scarlett for the plaintiff, and Campbell for the defendants. The facts of the case, the several clauses of the act of parliament upon which the question arose, and the arguments urged, are so fully stated and commented on in the judgment delivered by the Court, that it is deemed unnecessary to notice them here.

Cur. adv. vult.

Lord Tenterden, C. J., in the course of this term, delivered the judgment of the Court.

This case was argued before us in the last term. It was an action of assumpsit brought by the plaintiffs to recover the sum of 492l. 9s. as a compensation for the use of a way or passage for boats loaded with coals and other merchandise, along a part of the plaintiffs' canal, made under the powers of the 16 G. 3, c. 28, an act of parliament for making and maintaining the Stourbridge Canal with two collateral cuts. This canal was formed upon two levels; the upper or summit level, which communicates with the Dudley Canal, then intended to be made and since completed; upon the whole of which level there is no lock; and the lower or Stourbridge level, extending from Stourbridge to Stourton; and the two levels are connected by a chain of sixteen locks. The defendants have carried large quantities of coals and other goods, part from the Dudley Canal, part not, along the upper level, without

¹ Before Lord Tenterden, C. J., Littledale, Parke, and Taunton, Ja.

passing through any lock. Until recently they have paid to the plaintiffs a compensation in the nature of tonnage for the coals and goods so carried, as other persons have also done; but the defendants having latterly refused to do so, this action has been brought; and the question is, whether the plaintiffs are entitled to demand anything for the use of the part of the canal on which the defendants have so navigated; if they are, the sum claimed is admitted to be reasonable, and the plaintiffs are entitled to recover it: if they are not, the previous payments by the defendants cannot render them liable, and the plaintiffs cannot recover anything.

The canal having been made under the provisions of an act of parliament, the rights of the plaintiffs are derived entirely from the act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act. This rule is laid down in distinct terms by the Court in the case of The Hull Dock Company v. La Marche, 8 B. & C. 51, where some previous authorities are cited; and it was also acted upon in the case of The Leeds and Liverpool Canal Company v. Hustler, 1 B. & C. 424.

Adopting this rule, we are to decide whether a right to demand some compensation for the use of this part of the canal, is *clearly and unambiguously* given to the plaintiffs by this act of parliament; and we think it is not.

The act of parliament recites that the proposed canal will be of public utility (p. 732); the company are empowered to purchase land for the use of the navigation (p. 748); the lands acquired by voluntary or compulsory sale are vested in the proprietors for the use of the navigation, and for no other use or purpose whatsoever (p. 759); and all persons whatsoever are to have free liberty "to navigate upon the canal and collateral cuts with any boats or other vessels" of certain dimensions, "and to use the wharfs and quays for loading and unloading any goods, wares, merchandise, and commodities; and also to use the towing paths with horses for hauling and drawing such boats and vessels upon payment of such rates and dues as shall be demanded by the said company of proprietors not exceeding the rates before mentioned in the statute" (p. 788). This refers to a previous clause. p. 777, which provides that, in consideration of the great charge and expense of the proprietors in making, maintaining, and supplying with water the canal and collateral cuts, &c., it shall be lawful for the company from time to time to ask, demand, take, and recover for their own use and benefit for the tonnage and wharfage of iron, &c., and other commodities navigated, carried, and conveyed thereon, such rates and duties as they shall think fit, not exceeding the sum of sixpence for every ton of iron, &c., navigated on any part of the canal, and which shall pass through any one or more of the locks which shall be erected on the said canal. A similar provision is made for the tonnage and wharfage of goods in vessels navigated on the collateral cuts; and a power of bringing an action for arrears or distraining is given to the company.

Now, it is quite certain that the company have no right expressly given to receive any compensation except the tonnage paid for goods carried through some of the locks on the canal or the collateral cuts; and it is therefore incumbent upon them to show that they have a right clearly given by inference from some of the other clauses.

One of the clauses relied upon by the plaintiffs is that which gives the public the use of the canal, p. 788, and it is contended that no persons have a right to use any part of the canal under that clause, except those who actually do pay some of the rates or dues, and consequently pass some of the locks; and that if individuals have no right to navigate a particular part, the company may make their own bargain as to the terms upon which they may be permitted to do so.

But the clause in question is capable of two constructions; one, that those persons who pass the locks, and therefore pay the rates, and those only, are entitled to navigate any part of the canal or cuts; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public and in favour of the company, the latter is in favour of the public and against the company, and is therefore, according to the rule above laid down, the one which ought to be adopted.

And indeed the more obvious meaning of this clause is, to declare that the canal is dedicated to the public, but, at the same time, to preserve the right of the company to the rates already given; and it is reasonable to suppose that, by the section p. 777, which gives the rates as a compensation for the expenses of the proprietors, the legislature meant to include all the benefit they were to derive from the canal, and not to leave the company to make what agreement they pleased with the public in cases not provided for, and to gain an unlimited profit from a particular part of it. They probably did not contemplate the case of persons using the canal who did not pass any lock; but whether the omission was intentional, or arose from inadvertence, it is still an omission in that clause which provides for the emolument of the company.

Another section upon which some reliance was placed, was that in page 789, which gives to the owners of adjoining lands the power to use any pleasure boats on the canal, &c. (so as the same do not pass through any lock), without paying any rates or dues for the same, and so as such boat be not used for carrying any goods; and it is argued that the inference arising from the latter part of this clause is, that pleasure boats carrying goods would be liable to pay rates, though they should pass no locks; and if pleasure boats, then all other boats should be equally liable. And there is no doubt but that this provision does

afford some colour for this argument. The object of the clause appears to have been, partly to secure the right of the proprietors to use the canal with pleasure boats; (and in that respect it was introduced pro majore cautela;) and partly to prevent the company being injured by their passing through locks; and the framer of the clause seems to have added the last provision in the section merely to put pleasure boats with goods on board, on the footing of loaded vessels, without considering whether loaded vessels were liable to duties or not. At any rate this clause is not sufficient, in our judgment, to enable us to say that it is clear the legislature intended to give the plaintiffs the right to the compensation claimed for the use of a part of the canal where there is no lock.

Upon the principle of construction, therefore, above laid down, viz., that the company are entitled to impose no burthen on the public for their own benefit except that which is clearly given by the act, we are of opinion that, as their right to claim this compensation is not clearly given by the act, the plaintiffs are not entitled to recover.

Judgment for defendants.

GRAY, J., IN CENTRAL TRANSPORTATION CO. v. PULL-MAN CAR CO.

1891. 139 U.S. 24, p. 49.

By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 544-548; Dubuque & Pacific Railroad v. Litchfield, 23 How. 66, 88, 89; Slidell v. Grandjean, 111 U. S. 412, 437, 438. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority. Oregon Railway v. Oregonian Railway, 130 U. S. 26, 27.

MILLER, J., IN OREGON RAILWAY & NAVIGATION CO. v. OREGONIAN RAILWAY CO.

1889. 130 U.S.1, pp. 26, 27.

It is to be remembered that where a statute making a grant of property, or of powers, or of franchises, to a private individual, or a private corporation, becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or the general public. As was said in the case of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, "in this court the principle is recognized that in grants by the public nothing passes by implication." See also *Dubuque and Pacific Railroad Co.* v. *Litchfield*, 23 How. 66; *Turnpike Co.* v. *Illinois*, 96 U. S. 63.

Therefore if the articles of association of these two corporations, instead of being the mere adoption by the corporators themselves of the declaration of their own purposes and powers, had been an act of the legislature of Oregon conferring such powers on the corporations, they would be subject to the rule above stated and to rigid construction in regard to the powers granted. How much more, then, should this rule be applied, and with how much more reason should a court, called upon to determine the powers granted by these articles of association, construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation.

We have to consider, when such articles become the subject of construction, that they are in a sense ex parte; their formation and execution — what shall be put into them as well as what shall be left out — do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned rather than the general good.

These articles, when signed by the corporators, acknowledged before any justice of the peace or notary public, and filed in the office of the Secretary of State and the clerk of the proper county, become complete and operative. They are, so far as framed in accordance with law, a substitute for legislation, put in the place of the will of the people of the State, formerly expressed by acts of the legislature. Neither the officer who takes such acknowledgment, nor those who file the articles, have any power of criticism or rejection. The duty of the first is to certify to the fact, and of the second to simply mark them filed as public documents, in their respective offices.

These articles, which necessarily assume by the sole action of the corporators enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of

the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is whether they conform to the authority given by statute in regard to corporate organizations, it is always to be determined upon just construction of the powers granted therein, with a due regard for all the other laws of the State upon that subject, and the rule stated above.

WHITAKER v. DELAWARE & HUDSON CANAL CO.

1878. 87 Pa. State, 34.1

Case to recover for damages to plaintiff's lumber rafts while passing through the schute of defendants' dam, alleged to have resulted from the improper construction and maintenance of such dam. At the trial, in the Court of Common Pleas, after evidence had been introduced by both sides, Waller, P. J., directed a verdict for defendants. Plaintiff took a writ of error.

G. G. Waller, for plaintiff in error.

H. M. Seely, for defendant in error.

TRUNKEY, J. The defendants were incorporated under the laws of New York, and by divers statutes of this state, are vested with certain public franchises. For the purposes of the grant the dam across the Delaware river was built about fifty years ago, and the right to maintain it is conceded. In the Act of 1825, Pamph. L. 142, is a provision "That the said company shall not erect any works, or make any improvement, connected with the Delaware river, unless the same shall be so constructed as to leave the channel of said river as safe and as convenient for the descent of rafts as it now is." The plaintiff complains that the river is not as safe and convenient for navigation as before the erection of the dam. Unquestionably this is so. A dam in a stream is an impediment and in some degree renders its navigation less safe and convenient. A literal construction of this provision makes it impossible to build and maintain the dam, and the conceded right vanishes. The statutes of this state, recognizing those of New York, and in connection therewith, conferring the power to construct a great public highway, are nugatory under a strict construction of the section providing for safe and convenient navigation of the river. This was not the legislative intent. It could not have been intended to grant a franchise to build a public highway, in connection with one in a sister state, and so clog it that the work could never be executed.

Various statutes, from time to time, have been enacted authorizing public improvements, some of which would obstruct or impede the

¹ Statement abridged. Arguments, and part of opinion, omitted. - ED.

navigation of rivers, and others the use of streets and roads, which contained provisions forbidding such obstructions and impediments. The courts have uniformly held that these provisions should be liberally construed, so as not to destroy the grant. For instance, the act of incorporation of the Monongahela Bridge Company contained a declaration that nothing therein contained should authorize the erection of a bridge over the Monongahela river "in such manner as to injure, stop, or interrupt the navigation of the said river, by boats, rafts or other vessels." It was held that the proviso was not intended to prevent the erection of piers in the bed of the river, yet piers in the bed of a navigable stream inevitably endanger navigation and render it more difficult. They do not necessarily "injure, stop or interrupt the navigation" in the sense in which these words were used by the legislature. A strict literal meaning was not intended, and in the very nature of things, it never could have been. When the purpose of the franchise is the performance of a public act, the grant is to be so interpreted as to enable the act to be done. The extension of one highway over another is a public act, and not less so because of the power to exact tolls: Monongahela Bridge Co. v. Kirk, 10 Wright, 112. The charter of the Erie and North East Railroad Company had a provision that "The said railroad shall be so constructed as not to impede or obstruct the free use of any public road, street, lane or bridge now laid out, opened or built." "These words taken literally and in their strongest sense would prevent the railroad from being made on the streets at all. But we follow authority in saying they are not to be so interpreted. The defendants have a right to use a street if they take care to obstruct it as little as the nature and character of their improvement will permit, if they create no material or unnecessary impediment - no obstruction which could be avoided by any reasonable expenditure of money or labor. They cannot occupy the whole of a street and drive the public away from it altogether. But any street which is wide enough for the railroad and public both may be used on the terms mentioned." Per Black, C. J., Commonwealth v. E. & N. E. Railroad Co., 3 Casev 365.

It is no departure from the current of decisions, but in its direct line, to hold that the defendants can enjoy their franchise, can lawfully construct and maintain their dam, taking care to obstruct the channel as little as the nature and character of the improvement will permit, and leaving it as safe and convenient for the navigation of rafts as could be by any reasonable expenditure of money and labor. Their franchise is for the construction of one highway over another. The whole community are interested in both. Private charters are strictly interpreted. In them what is not expressed or necessarily implied, is not granted, and what is doubtful is resolved in favor of the sovereign. But when the sovereign grants a public franchise over a highway, a clause relative to the use of said highway will not be so construed as to defeat the grant.

The plaintiff does not claim merely for consequential damages, re-

sulting solely from the construction of the dam. If he did, the defendants' answer would be found in Clark v. Birmingham and Pitts. Bridge Co., 5 Wright 147, and Monongahela Bridge Co. v. Kirk, supra.

He claims further for an immediate injury, consequent upon the defendants' negligence, in that they "built and left the said dam in and across said highway, in a dangerous, insecure and impassable state and condition." His averment implies much more than such obstruction as was necessary for the purposes of the franchise, and, if established, and there was no contributory negligence, his right to recover is clear. If he adduced sufficient proof of such negligence, it should have been submitted to the jury.

[After considering the evidence, the Court held, that it was insufficient to warrant a finding that the defendants were guilty of negligence.]

Judgment affirmed.

PROPRIETORS OF CHARLES RIVER BRIDGE v. PROPRIETORS OF WARREN BRIDGE.

1837. 11 Peters U. S. 420.1

Error to Supreme Court of Massachusetts. Bill in equity to enjoin the building of Warren Bridge, and for general relief.

In 1650, the Massachusetts Legislature granted to Harvard College the power to dispose, by lease or otherwise, of the ferry from Charlestown to Boston. In 1785, the legislature incorporated "The Proprietors of Charles River Bridge," for the purpose of erecting a bridge in the place where the ferry was then kept. The charter was limited to forty years from the opening; the company were to pay 200l annually to Harvard College; and at the end of the forty years the bridge was to be the property of the commonwealth, saving to the college a reasonable annual compensation for the annual income of the ferry. bridge was opened in 1786. In 1792, the legislature chartered The Proprietors of West Boston Bridge to bridge the same river at a point about a mile and a half from the first bridge. The 7th section of the act of 1792 extends the charter of Charles River Bridge to seventy years from its opening; inasmuch as the erection of West Boston Bridge "may diminish the emoluments of Charles River Bridge." In 1828, the legislature incorporated Proprietors of Warren Bridge to erect another bridge across Charles River, distant only sixteen rods on the Charlestown side and about fifty rods on the Boston side from the bridge of the plaintiffs. Warren Bridge, by the terms of its charter, was to be

¹ Statement abridged. Arguments omitted. — ED.

surrendered to the State, as soon as the expense of building and supporting it should be reimbursed; and this period was in no event to exceed six years from the time of beginning to receive toll. A supplemental bill was filed, alleging that the Warren Bridge had been so far completed as to be open for travel. In the argument in the U. S. Supreme Court, it was admitted that sufficient toll had been received by the owners of the Warren Bridge to reimburse their expenses, that the bridge has now become the property of the state and has been made a free bridge; and that the value of the franchise granted to the owners of the Charles River Bridge has, by this means, been entirely destroyed.

In the Supreme Court of Massachusetts the judges were equally divided in opinion; and the bill was there dismissed by a decree *proforma*. 7 Pick. 344.

Dutton and Webster, for plaintiffs. Greenleaf and Davis, contra.
Tanex, C. J.

The plaintiffs in error insist mainly upon two grounds: 1. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "the proprietors of the Charles River Bridge;" and that under and by virtue of this transfer of the ferry right, the rights of the bridge company were as exclusive in that line of travel as the rights of the ferry. independently of the ferry right the acts of the legislature of Massachusetts of 1785, and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "Proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren Bridge, in 1828, impairs the obligation of one or both of these contracts.

It is very clear that in the form in which this case comes before us, being a writ of error to a state court, the plaintiffs in claiming under either of these rights must place themselves on the ground of contract, and cannot support themselves upon the principle that the law devests rested rights. It is well settled by the decisions of this court that a state law may be retrospective in its character, and may devest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract.

[The learned judge then held, that the ferry rights, and all franchises connected therewith, were extinguished, and not transferred to the Charles River Bridge corporation.]

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge," and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument, of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals.

[The learned judge here cited and commented upon Stourbridge Canal v. Wheeley, 2 B. & Ad. 793, ante.]

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits. the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time. the rules by which public grants are to be construed in this country. The subject has already been considered in this court; and the rule of construction, above stated, fully established.

[After referring to U. S. v. Arredondo, 6 Peters, 738; Jackson v. Lamphire, 3 Peters, 289; and Beaty v. Lessee of Knowles, 4 Peters, 168; the opinion proceeds.]

But the case most analogous to this, and in which the question came more directly before the court, is the case of the Providence Bank v. Billings and Pittman, 4 Pet. 514, and which was decided in 1830. In that case, it appeared that the legislature of Rhode Island had chartered the bank, in the usual form of such acts of incorporation. charter contained no stipulation on the part of the State, that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterwards, a law was passed, imposing a tax on all banks in the State; and the right to impose this tax was resisted by the Providence Bank, upon the ground that, if the State could impose a tax, it might tax so heavily as to render the franchise of no value, and destroy the institution; that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. But the court said that the taxing power was of vital importance, and essential to the existence of government; and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the court, the late chief justice states the principle, in the following clear and emphatic language. Speaking of the taxing power, he says, "as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.", The case now before the court, is, in principle, precisely the same. /It is a charter from a State. incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River Bridge, is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the State, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience, and prosperity of the people. (A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished.) And when a corpora-

tion alleges, that a State has surrendered for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass; the community have a right to insist, in the language of this court above quoted, "that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the State to abandon it does not appear." The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court, was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used, from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant; and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of

the faculties or franchises granted to that corporation have been revoked by the legislature, and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain, and that they impaired, or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, Does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none, no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. 4 Pet. 514. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done.

But the case before the court is even still stronger against any such implied contract as the plaintiffs in error contend for. The Charles River Bridge was completed in 1786. The time limited for the duration of the corporation, by their original charter, expired in 1826. When, therefore, the law passed authorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges, and franchises of the company, must depend upon the construction of the last-mentioned law, taken in connection with the act of 1785.

The act of 1792, which extends the charter of this bridge, incorporates another company to build a bridge over Charles River; furnish-

ing another communication with Boston, and distant only between one and two miles from the old bridge.

The first six sections of this act incorporate the proprietors of the West Boston Bridge, and define the privileges, and describe the duties of that corporation. In the 7th section there is the following recital: "And whereas the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston Bridge may diminish the emoluments of Charles River Bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years from the day the bridge was completed, subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter, the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter, and only seven years after it was granted; thereby showing, that the State did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem that the legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights impaired.

On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given because the company had undertaken and executed a work of doubtful success; and the improvements which the legislature then contemplated, might diminish the emoluments they had expected to receive from it. It results from this statement, that the legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the State. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter an implied agreement which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required, and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer from it the nature of the very instrument in which the legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the State, to make such a contract.

Indeed, the practice and usage of almost every State in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither States, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws, never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.

And what would be the fruits of this doctrine of implied contracts on the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of

travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results.

Many other questions of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question, involving the construction of the constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it.

Some questions, also, of a purely technical character, have been made and argued, as to the form of proceeding and the right to relief. But enough appears on the record, to bring out the great question in contest; and it is the interest of all parties concerned, that the real controversy should be settled without further delay; and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding, in which the parties have brought it before the court.

The judgment of the supreme judicial court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

[McLean, J. delivered an opinion in favor of dismissing the bill for want of jurisdiction. Story, J. delivered an opinion dissenting from

the conclusions of Taney, C. J. Thompson, J. concurred in the views of Story, J. The following extracts are from the opinion of Story, J.]

Story, J. . . . It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the king; for where there is any doubt, the construction is made most favorably for the king, and against the grantee. The rule is not disputed. But it is a rule of very limited application. To what cases does it apply? To such cases only where there is a real doubt; where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail, for the reason, (says the common law,) "that it will be more for the benefit of the subject, and the honor of the king, which is to be more regarded than his profit." Com. Dig. Grant, G. 12; 9 Co. R. 131, a; 10 Co. R. 67, b; 6 Co. R. 6. And in every case the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the king. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced.

But what, I repeat, is most material to be stated, is, that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, favorably to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonour of the government, that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract.

If, then, the present were the case of a royal grant, I should most strenuously contend, both upon principle and authority, that it was to receive a liberal, and not a strict, construction. I should so contend upon the plain intent of the charter, from its nature and objects, and from its burdens and duties. It is confessedly a case of contract, and not of bounty; a case of contract for a valuable consideration; for objects of public utility; to encourage enterprise; to advance the public convenience; and to secure a just remuneration for large outlays of private capital. What is there in such a grant of the crown, which

should demand from any court of justice a narrow and strict interpretation of its terms?

The present, however, is not the case of a royal grant, but of a legislative grant, by a public statute. The rules of the common law in relation to royal grants, have, therefore, in reality, nothing to do with the case. We are to give this act of incorporation a rational and fair construction, according to the general rules which govern in all cases of the exposition of public statutes. We are to ascertain the legislative intent; and that once ascertained, it is our duty to give it a full and liberal operation.

What solid ground is there to say, that the words of a grant in the mouth of a citizen, shall mean one thing, and in the mouth of the legislature shall mean another thing? That, in regard to the grant of a citizen, every word shall, in case of any question of interpretation or implication, be construed against him, and in regard to the grant of the government, every word shall be construed in its favor? That language shall be construed, not according to its natural import and implications from its own proper sense, and the objects of the instrument; but shall change its meaning, as it is spoken by the whole people, or by one of them? There may be very solid grounds to say, that neither grants nor charters ought to be extended beyond the fair reach of their words; and that no implications ought to be made which are not clearly deducible from the language and the nature and objects of the grant.

There is great virtue in particular phrases; and when it is once suggested, that a grant is of the nature or tendency of a monopoly, the mind almost instantaneously prepares itself to reject every construction which does not pare it down to the narrowest limits. It is an honest prejudice, which grew up in former times from the gross abuses of the royal prerogatives; to which in America, there are no analogous authorities. But what is a monopoly, as understood in law? It is an exclusive right granted to a few, of something which was before of common right.

No sound lawyer will, I presume, assert that the grant of a right to erect a bridge over a navigable stream, is a grant of a common right. Before such grant, had all the citizens of the State a right to erect bridges over navigable streams? Certainly they had not; and, therefore, the grant was no restriction of any common right. It was neither a monopoly; nor in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before; and had no tendency to take it from him. It took, indeed, from the legislature the power of granting the same identical privilege or franchise to any other persons. But this made it no more a monopoly, than the grant of the public stock or funds of a State for a valuable consideration. Even in cases of

monopolies, strictly so called, if the nature of the grant be such that it is for the public good, as in cases of patents for inventions, the rule has always been to give them a favorable construction in support of the patent, as Lord Chief Justice Eyre said, ut res magis valeat quam pereat; Boulton v. Bull, 2 H. Bl. 463, 500.

Taking this to be a grant of a right to build a bridge over Charles River, in the place where the old ferry between Charlestown and Boston was then kept, (as is contended for by the defendants,) still it has, as all such grants must have, a fixed locality; and the same question meets us, is the grant confined to the mere right to erect a bridge on the proper spot, and to take toll of the passengers who may pass over it, without any exclusive franchise on either side of the local limits of the bridge? Or does it, by implication, include an exclusive franchise on each side, to an extent which shall shut out any injurious competition? In other words, does the grant still leave the legislature at liberty to erect other bridges on either side, free or with tolls, even in juxtaposition with the timbers and planks of this bridge? Or is there an implied obligation, on the part of the legislature, to abstain from all acts of this sort which shall impair or destroy the value of the grant? The defendants contend that the exclusive right of the plaintiffs extends no further than the planks and timbers of the bridge, and that the legislature is at full liberty to grant any new bridge, however near; and although it may take away a large portion, or even the whole of the travel which would otherwise pass over the bridge of the plaintiffs. And to this extent the defendants must contend; for their bridge is, to all intents and purposes, in a legal and practical sense, contiguous to that of the plaintiffs.

The argument of the defendants is, that the plaintiffs are to take nothing by implication. Either (say they) the exclusive grant extends only to the local limits of the bridge, or it extends the whole length of the river, or at least up to Old Cambridge bridge. The latter construction would be absurd and monstrous, and therefore the former must be the true one. Now, I utterly deny the alternatives involved in the dilemma. The right to build a bridge over a river, and to take toll, may well include an exclusive franchise beyond the local limits of the bridge, and yet not extend through the whole course of the river, or even to any considerable distance on the river. There is no difficulty in common sense or in law in maintaining such a doctrine. But then, it is asked, what limits can be assigned to such a franchise? The answer is obvious: the grant carries with it an exclusive franchise to a reasonable distance on the river, so that the ordinary travel to the bridge shall not be diverted by any new bridge to the injury or ruin of the franchise. A new bridge which would be a nuisance to the old bridge, would be within the reach of its exclusive right. The question would not be so much as to the fact of distance, as it would be as to the fact of nuisance. There is nothing new in such expositions of incorporeal rights, and nothing new in thus administering, upon this foundation, remedies in regard thereto. The doctrine is coeval with the common law itself. Suppose an action is brought for shutting up the ancient lights belonging to a messuage, or for diverting a watercourse, or for flowing back a stream, or for erecting a nuisance near a dwelling-house; the question in such cases is not a question of mere distance, of mere feet and inches, but of injury; permanent, real, and substantial injury, to be decided upon all the circumstances of the case.

But it is said that there is no prohibitory covenant in the charter. and no implications are to be made of any such prohibition. The proprietors are to stand upon the letter of their contract, and the maxim applies, de non apparentibus et non existentibus, eadem est lex. And yet it is conceded, that the legislature cannot revoke or resume this grant. Why not, I pray to know? There is no negative covenant in the charter; there is no express prohibition to be found there. The prohibition arises by a natural, if not by necesreason is plain. sary implication. It would be against the first principles of justice to presume that the legislature reserved a right to destroy its own grant. That was the doctrine of Fletcher v. Peck, 6 Cranch, 87, in this court, and in other cases turning upon the same great principle of political and constitutional duty and right. Can the legislature have power to do that indirectly which it cannot do directly? (If it cannot take away or resume the franchise itself, can it take away its whole substance and value?) If the law will create an implication that the legislature shall not resume its own grant, is it not equally as natural and as necessary an implication, that the legislature shall not do any act directly to prejudice its own grant or to destroy its value?

But then again, it is said, that all this rests upon implication, and not upon the words of the charter. I admit that it does; but I again say, that the implication is natural and necessary. It is indispensable to the proper effect of the grant. The franchise cannot subsist without it, at least for any valuable or practical purpose. What objection can there be to implications, if they arise from the very nature and objects of the grant? If it be indispensable to the full enjoyment of the right to take toil, that it should be exclusive within certain limits, is it not just and reasonable, that it should be so construed? If the legislative power to erect a new bridge would annihilate a franchise already granted, is it not, unless expressly reserved, necessarily excluded by intendment of law? Can any reservations be raised by mere implication to defeat the operation of a grant, especially when such a reservation would be coextensive with the whole right granted, and amount to the reservation of a right to recall the whole grant?

The truth is, that the whole argument of the defendants turns upon

an implied reservation of power in the legislature to defeat and destroy its own grant.

THE BINGHAMTON BRIDGE.

[CHENANGO BRIDGE CO. v. BINGHAMTON BRIDGE CO.]

1865. 3 Wallace U. S. 51.1

Error to the New York Court of Appeals.

Bill in equity by Chenango Bridge Co. to enjoin Binghamton Bridge Co. The plaintiff company was chartered by Section 4 of the Act of 1808, "for the purpose of erecting and maintaining a toll-bridge across the Chenango River, at or near Chenango Point." The corporation was "to have perpetual succession, under all the provisions, regulations, restrictions, clauses and provisions of the before-mentioned Susquehanna Bridge Company," (referred to in Section 3 of the same Act of 1808.) The latter company was incorporated by Section 38 of the Act of 1805, which gave the Susquehanna Bridge Co. all the "powers, rights, privileges, immunities, and advantages," contained in the incorporation of the Delaware Bridge Co. by Section 31 of the same Act of 1805. Said Section 31 enacted: "It shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of Delaware River, within two miles either above or below the bridges to be erected and maintained in pursuance of this act." Soon after the passage of the Act of 1808, the plaintiff company built a toll-bridge across the Chenango River, at Chenango Point. An 1855, the legislature granted a charter to the Binghamton Bridge Co., purporting to authorize the building of a bridge in close proximity to that of the plaintiffs. The latter company built a bridge a few rods above the old one. The old company filed a bill in the Supreme Court of New York to enjoin the new company. The plaintiffs contended that the exclusive rights given by Section 31 of the Act of 1805 to the Delaware Bridge Co. were imported by Section 38 of that Act into the charter of the Susquehanna Co.; that these again, thus imported, were translated into Section 3 of the Act of 1808; and that these last were carried finally into Section 4 of the latter Act; thus making a contract by the State with the Chenango Bridge Co., that no bridge should ever be built over the Chenango River within two miles of their bridge, either above or below it.

The answer denied the contract thus set up.

The Supreme Court of New York dismissed the bill; and this decree was affirmed by the Court of Appeals.

Mr. D. S. Dickenson, for Binghamton Bridge Co.

¹ Statement abridged. Arguments, and parts of opinions, omitted. — Er.

Mr. Mygatt, contra.

Mr. Justice Davis delivered the opinion of the Court.1

The Constitution of the United States declares that no State shall pass any law impairing the obligation of contracts; and the 25th section of the Judiciary Act provides, that the final judgment or decree of the highest court of a State, in which a decision in a suit can be had, may be examined and reviewed in this court, if there was drawn in question in the suit the validity of a statute of the State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The plaintiffs in error brought a suit in equity in the Supreme Court in New York, alleging that they were created a corporation by the legislature of that State, on the first of April, 1808, to erect and maintain a bridge across the Chenango River, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a grant in the nature of a contract that cannot be impaired. The complaint of the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the State, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the fifth of April, 1855, in plain violation of the contract of the State with them, authorized the defendants to build a bridge across the Chenango River within the prescribed limits, and that the bridge is built and open for travel.

The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built, on the sole ground that the statute of the State, which authorizes it, is repugnant to that provision of the Constitution of the United States which says that no State shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York, that the case finally reached and was heard in the Court of Appeals, which is the highest court of law or equity of the State in which a decision of the suit could be had. And that court held that the act, by virtue of which the Binghamton bridge was built, was a valid act, and rendered a final decree dismissing the bill. Everything, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a State court, and to support the writ of error, which seeks to re-examine and correct the final judgment of the Court of Appeals in New York.

The questions presented by this record are of importance, and have received deliberate consideration.

It is said that the revising power of this court over State adjudications is viewed with jealousy. If so, we say, in the words of Chief Justice Marshall, "that the course of the judicial department is marked

¹ Nelson, J., not sitting, being indisposed.

out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was, that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken, in the unshaken belief that it will never be forsaken.

A departure from it now would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the Government. An attempt even to reaffirm it, could only tend to lessen its force and obligation. It received its ablest exposition in the case of Dartmouth College v. Woodward, which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine, that the charters of private corporations are contracts, protected from invasion by the Constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

The principle is supported by reason as well as authority. It was well remarked by the Chief Justice, in the Dartmouth College case, "that the objects for which a corporation is created are universally such as the Government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant." The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on Government to provide for them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: " If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill." Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

It is argued, as a reason why courts should not be rigid in enforc-

ing the contracts made by States, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

If the knowledge that a contract made by a State with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere.

A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the Charles River bridge,1 the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the State, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. What, then, are the rights of the parties to this controversy?

[After considering the various N. Y. Acts in reference to Bridge Companies, and adopting substantially the construction contended for by plaintiffs, the opinion proceeds as follows:]

The legislature, therefore, contracted with this company, if they

would build and maintain a safe and suitable bridge across the Chenango River at Chenango Point, for the accommodation of the public, they should have, in consideration for it, a perpetual charter, the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge, or establish any ferry, within a distance of two miles, on the Chenango River, either above or below their bridge.

Has the legislature of 1855 broken the contract, which the legislatures of 1805 and 1808 made with the plaintiffs?

The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for "it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use; and every ferry ought to be under a public regulation." 1 As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," is, that the legislature will not make it lawful by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public. The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the Constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void.

Decree of the Court of Appeals of New York reversed, and a mandate ordered to issue, with directions to enter a judgment for the plaintiff in error, the Chenango Bridge Company, in conformity with this opinion.

[Chase, C. J., delivered a dissenting opinion.] Chase, C. J., Field, J., and Grier, J., dissented.

¹ Hargrave's Law Tracts, ch. ii. 16; The Enfield Toll Bridge Co. v. The Hartford and New Haven Railroad Co., 17 Connecticut, 63; Hooker v. Cummings, 20 Johnson, 100; Bowman v. Wathan, 2 McLean, 383.

PARROTT v. CITY OF LAWRENCE ET ALS.

1872. 2 Dillon U. S. Circuit Court Reports, 332.1

Motion to dissolve temporary injunction restraining the defendants, the Messrs. Wilson, from operating the ferry hereinafter described. Plaintiff is a citizen of Ohio, and a stockholder in the Lawrence Bridge Co. In his bill in equity, he alleges that the maintenance of the ferry infringes upon the rights of the Bridge Co.; and, to show his right to maintain the bill, alleges that the Bridge Co. and its officers have refused to proceed in the State courts to obtain redress.

Feb. 15, 1857, the Legislative Assembly of the Territory of Kansas incorporated the Lawrence Bridge Co.) granting the exclusive right and privilege of building and maintaining a bridge across the Kansas River, at the city of Lawrence for a period of twenty-one years with

power to establish and collect tolls.

Prior to said incorporation of the Bridge Co. the Legislative Assembly had, in 1855, granted to one Baldwin the exclusive right to establish a public ferry within two miles of Lawrence, for a term of fifteen years. The answer of some of the defendants alleges that Baldwin kept a ferry in the immediate vicinity of the bridge for some time after the erection of the bridge; when, for reasons unknown, he ceased to operate the ferry.

By the laws of Kansas, the county commissioners have the power to grant ferry licenses. In January, 1871, the commissioners licensed one Darling to keep a ferry, at Lawrence, for one year. The ferry was operated at first by Darling, and afterwards by the Wilsons, under an arrangement with the city of Lawrence, the city having purchased the ferry-boat of Darling. January 6, 1872, the commissioners granted to the defendant, Wilson, the right to keep and run a ferry on the Kansas River, at the city of Lawrence, for one year.

According to the bill, answer, and affidavits, it appears that the ferry-boat, or, as the bill styles it, the floating bridge, is operated in this way: Two ropes, or cables, are thrown across the river, fastened on each side, one of which is an endless chain. A rope is fastened to the upper side of the boat, or "floating bridge," and this rope glides upon the upper cable by means of a pulley attached to the other end of the rope, said pulley passing from side to side of the river with the boat, the motive power moving the boat back and forth across the stream being a stationary steam engine located on the north bank of the river. The boat itself is an ordinary flat-bottomed boat.

Thacher & Banks, and N. T. Stephens, for the complainant. Wilson Shannon, for the Messrs. Wilson and the city of Lawrence. Dillon, Circuit Judge. The grant to the bridge company by its

¹ Statement abridged. - ED.

charter is "the exclusive right and privilege of building and maintaining a bridge across the Kansas river at the city of Lawrence," and "to establish and collect tolls for crossing said bridge." If this right has not been invaded, the complainant is not entitled to an injunction against the running of the ferry. I say the ferry, for, in my judgment, it is clear that the means used to cross the river by the defendant, Wilson,—viz. a flat-bottomed boat, connected with cables spanning the stream, and moved or propelled back and forth across it by power supplied by a stationary engine on the bank—is a ferry, as distinguished from a bridge, both under the legislation of the State and according to the usual meaning of the word.

The passage over streams is generally effected in one of two ways, viz.: by bridges, which, as commonly constructed for the use of travellers and teams, are immovable structures or extensions of the highways over and accross the water; and by boats, which are movable and propelled by steam-power, horse-power, the action of the current, or similar agencies. When the passage is by the latter mode it is called ferrying, which implies a boat that moves back and forth across the stream, from bank to bank. The legislation of Kansas everywhere recognizes this distinction between bridges and ferries. In the Statutes of 1855 there are provisions for building bridges (chap. 18), and also for regulating ferries (chap. 71). At the first session of the legislature, in 1855, there were a great many special acts, some authorizing certain persons to build toll-bridges, and others to establish and maintain ferries. Among these numerous acts was one giving to John Baldwin the exclusive right to keep a public ferry across the Kansas river at the town of Lawrence for the period of fifteen years. years afterwards the legislature incorporated the Lawrence Bridge Company, giving it the exclusive right to build and maintain a bridge across the river at the same place. Did this invade the franchise which had been granted to Baldwin? Clearly not, for the two grants are different; the one was to keep a ferry and collect tolls or ferriage for crossing the stream by this mode — the other was to erect and maintain a bridge, &c., "to collect tolls for crossing the same." So that during the period for which Baldwin's ferry charter was to run, there were two modes of crossing the river at Lawrence expressly authorized, - the one by means of Baldwin's ferry, the other by means of the bridge of the Lawrence Bridge Company.

The contract of the legislature with the bridge company must be protected from subsequent invasion. But what was that contract? It was simply an exclusive right to build a bridge and to "collect tolls for crossing the same." It is argued that the contract with the bridge company was that the travel of a certain district, to-wit those passing the river at Lawrence, should pass over this bridge and pay tolls therefor. But it is clear that such was not the contract: 1st, because it is not so expressed, or fairly to be implied from the language used; and, 2d, because the existence of the Baldwin ferry charter, which must be

presumed to have been in the mind of the legislature when it passed the bridge charter, and which, by its terms, would continue in force many years after the period fixed for the completion of the bridge, shows that the legislature did not intend to make a contract with the bridge company to the effect that all persons and property crossing at Lawrence should pass over the bridge.

When we consider that legislative grants creating monopolies, while they are not to be cut down by hostile or strained constructions, are nevertheless not to be enlarged beyond the fair meaning of the language used (*Binghamton Bridge Case*, 3 Wall. 74), this conclusion seems, to my mind, so clear as not to admit of fair doubt.

It has been settled by adjudication that the exclusive right to a toll bridge is not infringed by the erection of an ordinary railroad bridge within the limits over which the exclusive right extended (Mohawk Bridge Company v. Railroad Company, 6 Paige, 564; Bridge Proprietors v. Hoboken Co. 1 Wall. 116, 150, and cases cited); and the reasoning upon which this conclusion rests shows that where the charter of the bridge company is silent upon the subject, its exclusive right would not be invaded by the establishment, under legislative authority, of a public ferry, although this would have the incidental effect to injure the value of the franchise of the bridge company. That this is the opinion of the presiding justice of this court is plain from an expression to that effect, by way of argument, in his opinion in the Hoboken Bridge Case (1 Wall, 116, 149). In that case the legislature of New Jersey, in 1790, authorized the making of a contract with certain persons for the building of a bridge over the Hackensack river, and by the same statute enacted that it should not be lawful for any person to erect "any other bridge over or across the said river for ninety-nine years;" and it was held that the railroad bridge subsequently authorized, which was so constructed as that persons or property could not pass over it except in railway cars, did not impair the legal rights of the bridge proprietors. Mr. Justice MILLER, in discussing the question as to what was the meaning of the Act of 1790 and the contract with the persons who built the bridge, says: "There is no doubt that it was the intention of those who framed those two documents to confer on the persons now represented by the plaintiffs some exclusive privileges for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be enabled to decide whether the erection proposed by the defendants will infringe it. In the first place, it is not an exclusive right to transport passengers and property over the Hackensack and Passaic rivers, for there is no prohibition of ferries, nor is it pretended that they would violate the contract." (1 Wall. 149.)

In conclusion I may remark, that I have considered the very ingenious argument made by the complainant's counsel to show that the mode adopted by the defendants for transporting persons and property across the river is not a ferry, but a flying bridge, or a floating bridge, and

hence it is a violation of the franchise of the bridge company. But the single boat which is made to cross the river by steam-power, is not, in my judgment, a bridge of any kind, and certainly not a bridge within the meaning of legislation of the State of Kansas on the subject of bridges and ferries. It is argued, and perhaps with correctness, that the city of Lawrence transcended her powers in purchasing boats and in assisting Wilson to maintain his ferry under his license from the county authorities. But if this be granted, it falls far short of showing that the complainant is entitled, in consequence, to an injunction to prevent Wilson from running his ferry under his license.

Delahay, J., concurs. Injunction dissolved.

CHAPTER VIII.

POWERS USUALLY IMPLIED.1

SECTION I.

Power to Acquire Property by Purchase.

STOCKTON SAVINGS BANK v. STAPLES ET UX.

1893. 98 California, 189.2

Vanclier, C. Action to quiet title to an undivided half of a quarter section of land situate in the county of San Joaquin. The judgment was in favor of the plaintiff, and defendants have appealed therefrom, and from an order denying their motion for a new trial. Robert Coffee, who is admitted to have been the source of title, conveyed an undivided half of the quarter section to the defendant Mary P. Staples in March, 1870; and it is not disputed that she remained a tenant in common with him until the 2d day of June, 1875, at which time it is claimed by plaintiff that he ousted her, and thence maintained a continuous adverse possession of her interest until September 11, 1888, when he conveyed the whole quarter section to Alice L. Hudson, who continued the adverse possession until September 20, 1890, when she conveyed the entire quarter section to the plaintiff. This action was commenced October 15, 1890. The court found all the essential elements of a continuous adverse possession by Robert Coffee, Alice L. Hudson, and

^{1 &}quot;... There is probably not a single act of incorporation among the thousands that are to be found in our statute book, which does not contain some grant of power, or some restriction, which the corporation thereby created would have taken or been subjected to, if the charter had been silent on the subject. In the charter before me, (and in every other granted before the Revised Statutes, that I recollect to have examined, there are similar provisions,) it is enacted that this body corporate may have continual succession, and be capable in law of suing and being sued, and may have a common seal; all of which rights were conferred by the simple expression, that it was created a body corporate.

[&]quot;... The inference from the express grant of this power or right in one charter or act, that the power is not incident to another corporation of a different class, is therefore very feeble."

SANDFORD, Vice-Chancellor, in Barry v. Merchants' Exchange Co., (A. D. 1844,) 1 Sandf. N. Y. Chancery, 280, p. 295. — Ed.

² Only part of the opinion is given. - ED.

plaintiff, except notice to Mary P. Staples of its hostile character, from June 2, 1875, until the commencement of this action; and further found, substantially, that Mary P. Staples had actual notice of the adverse and hostile character of such possession from 1884 until the commencement of this action. Thus it appears that the title upon which plaintiff recovered was found to have been acquired by prescription.

Appellants contend that the court erred in overruling their objections to the introduction in evidence of the deed from Mrs. Hudson to plaintiff. The ground of the objection was that the plaintiff "was not shown to have the power to purchase, hold, or receive said land, nor that said land was conveyed to it for any of the purposes of the corporation." There was no evidence to show for what purpose the corporation had been organized, or what business it was conducting. The court found according to the allegation of the complaint, not denied in the answer, that at all the times stated the plaintiff "was a corporation duly organized and incorporated under and by virtue of the laws of the state of California, and having its office and principal place of business in the city of Stockton, county of San Joaquin, state of California." Under these circumstances I think it must be presumed (as against the defendants, at least) that the corporation had power to purchase and hold the land. Mining Co. v. Clarkin, 14 Cal. 545; Evans v. Bailey, 66 Cal. 112; Hagar v. Board, 47 Cal. 222; People v. La Rue, 67 Cal. 526; Spel. Priv. Corp. §§ 203, 206. It does not appear under what statute, or for what purpose, the plaintiff was incorporated, nor what business it was engaged in, nor for what purpose the property was purchased or used. In answer to a similar objection in People v. La Rue, supra, it was said: "If there was anything in its charter, or the business in which it was engaged, or in the law under which it was organized, in any manner abridging its right to hold land, it does not appear of record; hence we deem the objection untenable." 1

BELCHER C. and TEMPLE C. concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

GAROUTTE J., PATERSON J., HARRISON J.

Hearing in Bank denied.

¹ In People v. La Rue, the passage above quoted is preceded by these sentences.

It is said by Angell & Ames on Corporations, at section 110, that "both by the laws of England and the United States, there are several powers and capacities which tacitly and without any express provision are considered inseparable from every corporation." Kyd enumerates five of these as necessarily and inseparably belonging to every corporation.

In enumerating them, the third in number is the right or power "to purchase lands and hold them for the benefit of themselves and their successors."

The presumption is that the corporation in question had the right to purchase and hold the lands by it represented.

NICOLL v. NEW YORK & ERIE R. R. CO.

1854. 12 New York, 121.1

EJECTMENT commenced in the supreme court in February, 1847, and tried at the Orange county circuit, held by Mr. Justice Edwards in October, 1848. The jury found a special verdict, from which it appeared that on the first day of July, 1836, Nicholas A. Dederer, being the owner in fee simple of a farm situate in Blooming Grove, Orange County, executed to the Hudson and Delaware Railroad Company a deed, dated that day, whereby, in consideration of the benefits and advantages to him of the railroad proposed to be made by the company, and of one dollar to him paid by the company, he granted to such company the privilege of surveying and laying out, by its agents and engineers, through his farm or tract of land, the route and site of its road; and also granted, bargained, sold, and conveyed unto the company and its successors, so much of the farm as might be selected and laid out by the company for the site of its railroad, six rods in width across the farm; provided always, and such grant was made upon the express condition, that the company should construct its railroad within the time prescribed by the act incorporating the same. That subsequently, and before the 27th of October, 1836, the company selected and laid out, for the site of its railroad through the farm, a strip of land six rods wide extending through the farm. That on the first of April, 1844, the farm formerly owned by Dederer, by virtue of sundry mesne conveyances, became the property of the plaintiff in fee simple, subject only to such right as the Hudson and Delaware Railroad Company then had to any portion thereof sufficient for the track of its That this company, on the 27th of October, 1836, commenced the construction of its railroad, but never completed or put in operation a double or single track, or any part thereof. That in pursuance of an act of the legislature, entitled an act authorizing the New York and Erie Railroad Company to construct a branch road, terminating at the village of Newburgh, passed April 8, 1845, the Hudson and Delaware Railroad Company were authorized to, and on the 14th of September, 1846, did execute to the defendant, the New York and Erie Railroad Company, a deed, and thereby for a valuable consideration granted, bargained, sold, and conveyed to the defendant and its successors, the maps, charts, drafts, surveys, and other personal property of the Hudson and Delaware Company, and all its rights, privileges, immunities and improvements, acquired under and by virtue of the original act of incorporation, or of any act amending it, or in any other manner; and also all the grants, lands, and real estate acquired by or ceded or conveyed to the Hudson and Delaware Company, and all its right, title, and interest to the same, and particularly the right of way, granted by

¹ Arguments omitted. — ED.

Dederer to the company and its successors, by the deed from him above mentioned. That when this suit was commenced, on the 25th of February, 1847, the defendant had not completed or put in operation its branch road terminating at Newburgh, or any part of it, nor had it done so when the cause was tried. That on the 2d of December, 1846, the defendant entered upon the strip of land six rods wide, mentioned in the deed from Dederer and laid out by the Hudson and Delaware Company through his farm as the site of its road, and ejected the plaintiff therefrom, and that the defendant was still in the possession thereof. The suit was brought to recover possession of this strip of land from the defendant.

The justice before whom this cause was tried ordered judgment upon the special verdict in favor of the plaintiff. The defendant appealed, and the supreme court, sitting in general term in the 3d district, reversed the judgment and gave judgment in favor of the defendant. (See 12 Barb., 460.) The plaintiff appealed to this court.

E. L. Fancher, for appellant.

T. M. Kissock, for respondent.

Parker, J. The grant from Dederer to the Hudson and Delaware Railroad Company, bearing date the first day of July, 1836, was made to that company "and their successors." Under that grant, there can be no doubt the Hudson and Delaware Railroad Company took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute. (2 Kent, 281; Co. Litt., 44 a, 300 b; 1 Kyd on Corp., 76, 78, 108, 115; 3 Pick. 239.) And in this case the power was expressly conferred by the 9th section of the charter (Sess. Laws of 1835, p. 113); and by the 16th section there were given to it the general powers conferred upon corporations (1 R. S. 731), one of which is that of holding, purchasing and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee; for the statute is now imperative, that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant. (1 R. S., 748, § 1.)

But it is objected that because, by the act of incorporation, there was given to it only a term of existence of fifty years (Laws of 1835, p. 110, § 1), therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held, that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because, in his earthly existence, he is not immortal.

Under such a rule, a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute. (1 R. S., 748, § 1.) The change made by the statute favors the grantee, where there are no express terms in the grant, by the presuming the grantor intended to convey all his estate.

At common law, it was only where there were no express terms, defining the estate in the conveyance, that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual, without such words, conveyed only a life estate. For the same reason a grant, without such words, to a corporation aggregate (Viners Ab., Estate, L. 3), or to a mayor or commonalty (ib., 3), conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and, in their absence, we look, not to the term of existence of the grantee to ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All his estate is deemed to have passed by the grant. (1 R. S., 748, § 1.)

All this is applicable only to cases where the grant is silent as to the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law, that "no implication shall be allowed against an express estate limited by express words." (Viner's Ab., Implication, A., 5; 1 Salk., 236.)

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient. (5 Denio, 389; 2 Preston on Estates, 50.) Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a deter-

minable fee, for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; ¹ but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter. (2 Kent, 282; 5 Denio, 389; 1 Comst. R. 509.) Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking nouses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence.

The Hudson and Delaware Railroad Company then, by their grant from Dederer, took a title in fee, but it was a fee upon condition, there being in the grant an express condition that the road should be constructed by the company within the time prescribed by the act of incorporation. This was not a condition precedent, as was argued by the plaintiff's counsel, but a condition subsequent.

Kent says (4 Kent, 129): "Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates." They can only be reserved for the benefit of the grantor and his heirs, and no others can take advantage of a breach of them. (4 Kent Com. 122, 127; 2 Black. Com., 154.) The plaintiff took his deed of the farm on the first of April, 1844. This was one year before the expiration of the time for constructing the road, and two years before the Hudson and Delaware Railroad Company conveyed to the defendants. At that time, therefore, there had been no breach of the condition; on the contrary, the right of the company was expressly recognized and reserved in the deed. Certainly, then, Dederer, when he conveyed, had no assignable interest.

[The concurring opinion of Gardiner, C. J., is omitted.]

Judgment affirmed.

¹ This view is now rejected. See Bacon v. Robertson, post; also Gray on the Rule against Perpetuities, §§ 44-51; and 2 Kent's Com. 307, note b.—ED.

SECTION II.

Power to Acquire Property by Devise.

WHITE v. HOWARD.

1871. 38 Conn. 342.1

BILL IN EQUITY by the executors of the will of William Bostwick, praying for advice in the construction of the will. The residue, both real and personal, was devised to trustees, to be applied for the benefit of testator's daughter during her life. If the daughter should die leaving no husband or issue, a certain part of the trust fund was to be divided between six societies, of which the American Tract Society, a New York corporation, was one. The daughter died, leaving neither husband nor children. Counsel for the heirs-at-law of the testator contend that the American Tract Society is incapable of taking real estate in Connecticut by devise, and that the residuary clause must fail so far as it attempts to devise real estate in Connecticut to that corporation.

H. White and J. S. Beach, for petitioners.

Doolittle and L. N. Bristol, for heirs of testator.

D. B. Beach, for heirs of daughter.

J. W. Edmunds, Cook, Campbell, G. N. Titus, T. Westervelt, A. L. Edwards, S. E. Baldwin, for various Societies.

FOSTER J.

It is asserted that the American Tract Society can take neither real or personal property under this will. That it cannot take real, because its charter of incorporation, granted by the state of New York, does not confer the power of taking by devise; that it cannot take personal, because the charter provides that the net income of said society arising from real and personal estate shall not exceed the sum of \$10,000 annually. This limit it is claimed has been reached and exceeded, and so the capacity of the society to take property is exhausted. This society was incorporated by a special act of the legislature of the state of New York, passed May 26, 1841. The third section of its charter provides that the corporation shall possess the general powers, and be subject to the provisions, contained in title 3d of chapter 18 of the first part of the revised statutes, so far as the same are applicable and have not been repealed. The title and chapter referred to enumerate the powers of corporations, and the clause which bears directly upon this subject reads thus: "to hold, purchase, and convey such real and personal

 $^{^1}$ Statement abridged. Only so much of the opinion is given as relates to one point. Arguments omitted.— Ed.

estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." This charter was amended by the legislature of New York on the 31st of March, 1866, but as this was after the death both of the testator and of his daughter, that amendment need not be particularly considered, as it cannot materially affect the question involved. Now it is manifest that this corporation has express power by its charter to hold, purchase and convey real and personal estate, for specified purposes and to a limited amount. There is no express power to take by devise, nor is the power so to take expressly prohibited. We suppose there could be no doubt that this corporation could take by devise in New York, if the Statute of Wills of that state empowered corporations generally to take in that manner. The English Statute of Wills, passed in the time of Henry VIII, authorized every person having a sole estate in fee simple of any manors &c., "to give, dispose, will, or devise, to any person or persons, except to bodies politic and corporate, by his last will and testament in writing, or otherwise by any acts lawfully executed in his lifetime, all his manors &c., at his own will and pleasure, any law, statute, custom, or other thing theretofore had, made, or used to the contrary notwithstanding." Thus corporations, by express exception in these statutes, were not enabled to take lands directly by devise in England, and the Statute of Wills of the state of New York makes the same exception. By that statute it is enacted, that all persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate by a last will and testament duly executed &c. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." 3 N. Y. Rev. Stat., 138, (5th ed.). This corporation therefore, prior to the recent amendment of its charter, could not take by devise in New York, and such is the decision of their Supreme Court and Court of Appeals in this very case. And so it is earnestly contended that it cannot take by devise in Connecticut. We yield readily to the doctrine laid down in this connection in regard to corporations; indeed it is too thoroughly established to be doubted or questioned. That doctrine perhaps is nowhere better stated than in the case of Head v. Providence Ins. Co., 2 Cranch, 127, by the then illustrious head of the Supreme Court of the United States, the late Chief Justice Marshall. "It [a corporation] may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." Now this corporation stands at the bar of this court claiming the right to take lands within

¹ Corporations "always had the right at common law to take personal property by bequest; . . . and I entertain no doubt that they have that right under our statutes." WRIGHT, J., in Sherwood v. Am. Bible Society, 4 Abbott, N. Y. App. Dec. 227, p 231.— Ed.

our territory by devise. It is clothed with such powers as have been conferred by its charter. Those, a portion of them, as we have seen, are to hold, purchase, and convey real estate. It is not expressly authorized to take by devise, nor is it prohibited from so taking. Can it then take by devise? Not in New York, as we have seen. Therefore not in Connecticut, say the counsel for the heirs at law, for being a New York corporation, and by the law of that state devoid of power to take by devise, no argument is needed to show its inability to take by devise in Connecticut. This conclusion is too hastily drawn. If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion would be legal and logical. But the inability does not so arise. There is no prohibition in the charter; the inability is created by the New York Statute of Wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York Statute of Wills and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take created by the statute of a state, which is local, and a prohibitory clause in the charter, which everywhere cleaves to the corporation. The reasoning is fallacious, not recognizing this distinction. There being no prohibition in the charter, and the power to hold and convey real estate being expressly given, we must look to our own statutes and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut.

The state of New York has partially adopted the policy of England in regard to devises to corporations, though the English statutes, usually called the statutes of mortmain, have not been reënacted in that state. Those statutes began with Magna Charta, in 9 Henry III, and embrace a succession of acts down to and including 9 George II. They were intended to check the ecclesiastics of the Roman church from absorbing in perpetuity, in dead clutch, all the lands of the kingdom, and so withdrawing them from public and feudal charges. Shelford on Mortmain, 2. By the statute of 43 Eliz., ch. 4, known as the Statute of Charitable Uses, lands may be devised to a corporation for a charitable use, and the court of chancery will support and enforce such devises. Whether a court of equity has power to execute and enforce such trusts, as charities, independent of any statute, is a question which has been much discussed, and very high authorities can be quoted both in favor and against the exercise of such a power. We think the latter and better opinion to be in favor of an original and necessary jurisdiction in courts of equity as to devises in trust for charitable purposes, when the general object is sufficiently certain, and not contrary to any positive rule of law. It is unnecessary however to decide this question, for in this state we have no statutes of mortmain; no exception in our Statute of Wills prohibiting corporations from taking by devise; aliens, resident in this state or in any of the United States, may purchase, hold, inherit, or transmit real estate, in as full and ample a manner as native born citizens; their wives are entitled to dower; their children and other lineal descendants may inherit; and we have besides a statute, passed in our colonial days in 1702, in effect reënacting the statute of 43 Elizabeth, and containing indeed more liberal and comprehensive provisions to sustain devises of this description than are contained in the 43 Elizabeth. That act provides, that "all lands, tenements, or other estates, that have been or shall be given or granted by the General Assembly, or any town or particular person, for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be given or granted, according to the true intent and meaning of the grantor, and to no other use whatever."

We therefore entertain no doubt that the American Tract Society can take by devise in this state. As to the other objection, that having an income greater in amount than is allowed by its charter it has exhausted its power to take, it suffices to say that no such fact is found by the very competent committee whose report is on the record.¹

1 As to the alleged distinction between acts of the foreign corporation, which the charter does not authorize, or which it may forbid, and acts which upon the face of the charter are authorized, but which the general laws of the foreign state may prohibit: 27

"... it is submitted that the distinction indicated above is neither convenient nor correct on principle. It is not convenient, for nowadays the vast majority of corporations are incorporated under general statutes, and have no 'charters' properly speaking; so the distinction is fast losing its applicability. And the distinction seems incorrect on principle; it being a curious comity which will recognize in corporations powers which, under their own constitutions, they do not possess. The constitution of a corporation is composed of all the laws affecting the corporation; and embraces just as much statutes affecting corporations generally, as the particular statute—enabling act or special charter—immediately under which the corporation was organized.

"The correct distinction seems rather as follows: If the validity of an act, forbidden by the legislature of the state incorporating the foreign corporation on whose behalf or in regard to which the act was done, is to be passed on by the court of another state, by the true rule of comity the court should give effect to the prohibition according to the intent of the legislature enacting it. If the prohibition were apparently intended to inhere in the corporation, and to apply to all its acts wherever done, the court should give effect to it. But if it was rather part of the local policy of the state enacting it, of local policy which there is no reason for extending beyond state limits, nor even any reason for supposing the legislature would have desired to see thus extended, then the prohibition should not be enforced by the courts of other states, at least in regard to acts and matters outside of the state enacting it."

Taylor on Corporations, 3d ed., ss. 390, 391.

"The main objection to allowing corporations, in the State of their creation, to hold lands not occupied and used in, or necessary to, the exercise of their franchises, is based upon the idea that it might be prejudicial to the public interest of that State, to allow corporations to become speculators in lands, or to hold them in large amounts, keeping them out of market for an unreasonable time, and preventing improvement, &c.; but this objection could not well be urged in the State of their creation, against their holding lands in other States, taken in payment of debts justly due them, accruing in the course of their legitimate business. The State in which the land lies might, if it chose, object; but the State of their creation could not be interested in raising such objection, but so far as it was interested at all, it would seem to be in favor of sustaining the right; . . ."

CHRISTIANCY, C. J., in *Thompson* v. *Waters*, (A. D. 1872,) 25 Michigan, 214, p. 220. — Ed.

SECTION III.

Power to Alienate. 1 Power to Mortgage.

1 Kyd on Corporations, 1st ed., A. d. 1793, pp. 107, 108. Having considered the capacity of corporations to *take* property, we are naturally led, in the next place, to treat of the power they have to *dispose* of it.

All civil corporations, such as the corporations of mayor and commonalty, bailiffs and burgesses of a town, or the corporate companies of trades in cities and towns, and all corporations established by act of parliament for some specific purpose, unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had an unlimited control over their respective properties, and may alienate in fee, or make what estates they please for years, for life, or in tail, as fully as any individual may do with respect to his own property.

AURORA, &c. SOCIETY v. PADDOCK.

1875. 80 Illinois, 264.2

CRAIG, J. This was a bill in equity, brought by appellees, to foreclose a mortgage executed by the Aurora Agricultural and Horticultural Society of Aurora, on the 28th day of December, 1870, to secure the payment of \$6000 loaned by John R. Coulter to the society. The court, on a hearing of the cause, rendered a decree directing a sale of the mortgaged premises in satisfaction of the mortgaged debt.

The society has prosecuted this appeal, and in order to obtain a reversal of the decree, it is insisted by the counsel for appellant:

First — That the society had no power whatever to mortgage.

Second — That the mortgage in question was wholly unauthorized.

The appellant was organized on the 6th day of March, 1869, under an act approved Feb. 15, 1855, which authorized the incorporation of agricultural societies. (Gross' Statutes, 1869, page 119.) By the third section of the act, the society was made a body corporate, with power to sue and be sued, to acquire and hold real estate not exceeding five hundred acres, to construct the necessary improvements and

2 Statement, and part of opinion, omitted. - ED.

¹ As to involuntarly alienation see post, chapter as to rights and remedies of creditors against corporate property and franchises.— Ed.

buildings for its purpose, to have and employ capital, machinery, live stock, etc., not exceeding in value \$10,000.

While it is true, no section of the act confers direct authority upon the society to sell or mortgage its property, except upon a dissolution of the corporation, yet the act does not prohibit or restrict the society from selling or giving a mortgage upon its real estate. The power to mortgage, when not expressly given or denied, must be regarded as an incident to the power to acquire and hold real estate and make contracts.

We understand it to be the common law rule, that corporations have an incidental right to alien or dispose of their lands and personal property, unless specially restrained by the act under which they are organized or by statute.

It is said in Angell & Ames on Corporations, p. 153: "Independent of positive law, all corporations have the absolute *jus disponendi* neither limited as to objects nor circumscribed as to quantity." The same doctrine is clearly laid down by Kent, vol. 2, page 280.

We are, therefore, of opinion, as the society was not prohibited from mortgaging its lands, it possessed the power to do so as an incident to the power to purchase and hold real estate and make contracts.

Decree affirmed.

MORISETTE (PLAINTIFF IN ERROR) v. HOWARD.

Supreme Court of Kansas, 1901. 63 Pacific Reporter, 756.

Johnston, J. This action was brought by W. H. Howard, trustee, to recover the possession of a stock of merchandise from A. Morisette, sheriff of Cloud county, who had seized it as the property of the Clyde Mercantile Company, at the instance of the creditors of that company. After the action was begun, Fannie L. Holman intervened, and alleged that she had previously purchased and paid for the merchandise, and was the actual owner and entitled to the possession of the same. The creditors of the mercantile company, through the sheriff, claimed that the sale of the goods to Holman was fraudulent as against them, and was made by the company without power or authority lawfully exercised, and therefore was invalid. The trial resulted in a verdict in favor of the purchaser, and is, in effect, a finding that the sale was made in good faith and for a sufficient consideration. The honesty of the transaction was decided by the jury, and is no longer open to question; but there is a contention that the mercantile company had no power to transfer property, and that, if it had, the power was not exercised in a legal and effective manner. The stock of goods, business, and good will which constituted the

entire assets of the corporation, were sold to Holman for \$3000 in money, payable in installments, and also for certain real estate in Kansas City, Mo., known as the "Ramsey Flats," upon which there was a mortgage. It is argued that the transfer of the entire assets and good will of the corporation would disable it from continuing the business for which it was organized, and that the attempt to do so is ultra vires and void. It is also contended that the acceptance of real property in consideration of the transfer, as well as holding of the same, are not within the purposes for which the mercantile company was organized. Our statute, which is only declaratory of the common law, provides that a corporation shall not employ its stock, means, assets, or other property for any other purpose than to carry out the objects for which it was created. Gen. St. 1899, § 1243. The mercantile company was organized for the purpose of buying and selling merchandise at retail, but that does not preclude the company from disposing of its property and closing out its business, if it is done in good faith and not for the purpose of delaying or defrauding its creditors. State v. Western Irrigating Canal Co., 40 Kan. 96, 19 Pac. 349. Counsel cites a number of cases to the effect that a corporation cannot abdicate its corporate functions or relieve itself from carrying out the object of its creation by a transfer of its entire property, or by otherwise disabling itself from performing corporate duties. The doctrine of these cases is applicable to corporations established for quasi public purposes, such as railroads and other companies having the right of eminent domain and other extraordinary privileges; but it has no application to corporations of a strictly private character, like the one in question. Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831; Treadwell v. Manufacturing Co., 7 Gray, 393; Howe v. Carpet Co., 16 Gray, 493; Hodges v. Screw Co., 1 R. I. 312; Evans v. Heating Co., 157 Mass. 37, 31 N. E. 698: 27 Am. & Eng. Enc. Law, 387. The mercantile company exercises no powers of a public nature, and a sale of its property and a retirement from business do not contravene public policy or affect the public in any way. It does not appear that the mercantile company obtained the real estate with a view of carrying on a real estate business, but, on the other hand, that the mercantile business was unprofitable, and the stockholders desired to wind up the affairs of the company by a sale and transfer of the business; and the real estate was taken in part payment, and as a step in the closing up of the corporate business. It appears to have been done in good faith, with the consent of the stockholders; and we see no reason why a mere trading corporation, like this one, may not close up its business in the manner pursued in this instance. The money consideration of the sale was used in paying creditors of the corporation other than those contesting; but it has been held that a corporation has the same dominion and control over the disposition of its assets and property as a partnership or an individual, and may make any honest disposition of them, and also that it has the same power and right to prefer its creditors that a partnership or an individual has. *Grand de Tour Plow Co.* v. *Rude Bros. Mfg. Co.*, 60 Kan. 145, 55 Pac. 848. Under the general finding of the jury, it must be assumed that the company and its agents acted in good faith in making the sale, and also in taking real estate in exchange for the goods, not as an investment, but as the most advantageous way of disposing of an unprofitable business, and closing it up with the least possible loss.

[Remainder of opinion omitted.]

Judgment affirmed.

COMMONWEALTH v. SMITH ET ALS.

1865. 10 Allen (Mass.), 449.

Bill in Equity seeking to impeach the validity of a mortgage, executed on the 30th of July 1855 by the Troy and Greenfield Railroad Company to the defendants as trustees, covering by its terms the franchise, railroad, and all other property of the corporation, then owned or thereafter to be acquired, to secure bonds to the amount of \$900,000, to be issued to the contractor as part compensation for constructing the railroad, payable in thirty years from date. This mortgage recited the provisions of a contract for the construction of the railroad, dated December 30, 1854, to the effect that such bond should be given; and it was made subject to a prior mortgage to the Commonwealth to secure state bonds to the amount of \$2,000,000, which the Commonwealth were to issue under the provisions of St. 1854, c. 226.

The following facts were agreed: Since the execution of the mortgage to the defendants, the Commonwealth have received two other mortgages upon the railroad and franchise of the Troy and Greenfield Railroad Company, one of which was dated on the 6th of July 1860, and the other on the 5th of March, 1862; and also a surrender from the corporation of all their property subject to redemption under St. 1862, c. 156. On the 4th of September 1862 the Commonwealth took possession of the mortgaged premises in various towns, for breach of condition, in the manner shown by various certificates thereof, which are now immaterial. The Commonwealth under their various mortgages have at various times, from October 1858 to July 1861, advanced to the Troy and Greenfield Railroad Company, large sums of money, amounting in all to several hundred thousand dollars. The corporation, under their mortgage to the defendants, have at various times. from August 1855 to July 1861, issued bonds to the amount in all of \$600,000, payable in thirty years from date. All of these bonds were issued in good faith, and are held by bona fide holders, and the corporation have issued no other bonds than the above. Before advancing any money to the corporation, the Commonwealth had actual notice of the execution of the mortgage to the defendants, and of the fact that a number of bonds had been issued under the same. The amount of capital stock of the corporation which, in December 1856, had been paid in was \$143,905.77.

Upon these facts, and others which are now immaterial, the case was reserved by the chief justice for the determination of the whole court.

D. Foster, for the Commonwealth. The mortgage to the defendants has never been sanctioned or ratified by the legislature, and its validity must depend on the question whether the common law powers of railroad corporations in Massachusetts permit them to execute mortgages, and if so to what extent. At common law, a railroad corporation has no power to execute any mortgage. This is clearly the English rule. Winch v. Birkenhead, &c. Railway, 7 Railw. & Canal Cas. 384. Beman v. Rufford, Ib. 48. South Yorkshire Railway, &c. v. Great Northern Railway, 9 Exch. 84. Shrewsbury, &c. Railway v. North Western Railway, 6 H. L. Cas. 113. It is also the prevailing opinion in this country. Pierce v. Emery, 32 N. H. 504. Hall v. Sullivan Railroad, 21 Law Reporter, 138. Tippets v. Walker, 4 Mass. 595. Gue v. Tide Water Canal Co. 24 How. 257. Worcester v. Western Railroad, 4 Met. 564. Treadwell v. Salisbury Manuf. Co. 7 Gray, 404. Opinion of Justices, 9 Cush. 611. Salem Mill Dam v. Ropes, 6 Pick. 32. The statutes of Massachusetts confer no such authority. St. 1854, c. 286. Gen. Sts. c. 63, §§ 120-123.

[Remainder of argument omitted.]

S. Bartlett & C Allen, for the defendants. Even if it be conceded that the franchise to be a corporation and the delegated right of eminent domain are inalienable, there is nothing in the nature of a franchise to operate a railroad which is of that character. A corporation enters into no contract with the state that it will go on and act under its charter. The security of the state is founded upon the rules which it prescribes and the restrictions which it imposes and the power which it reserves to repeal or alter at will; and upon the power which resides in courts to enforce the due execution of the powers which are granted, or exact forfeitures in case of abuse. It is quite immaterial what persons may compose the corporation; the individuals may all change, but the same duties will rest upon the corporation. The great weight of American authority is in favor of the existence of this power. Morrill v. Noyes, 3 Amer. Law Reg. (N. S.) 18. Miller v. Rutland, &c. Railroad, 36 Verm. 452, and cases cited. Platt v. New York, &c. Railroad, 26 Conn. 544. Hall v. Sullivan Railroad, 21 Law Reporter, 138. Bowman v. Watken, 2 McLean, 393, 394. Union Bank v. Jacobs, 6 Humph. (Tenn.) 515. Dinsmore v. Racine, &c. Railroad, 12 Wisconsin, 649. Macon, &c. Railroad v. Parker, 9 Georgia, 377. Pollard v. Maddox, 28 Alab. 321. Allen v. Montgomery Railroad, 11 Alab. 454. The course of legislation in Massachusetts has recognized this as a common law power. Sts. 1857, c. 178, §§ 1, 5; 1854, c, 423; c. 286, § 3; 1841, c. 44; Rev. Sts. c. 39, § 83; c. 44,

§ 11, et sey. The validity of a conveyance executed by full authority of a corporation, cannot be questioned by third parties, on the ground that the corporation itself had no authority to execute it. Although a corporation has exceeded its authority, yet the question cannot be tried collaterally, but it is a matter between the corporation and the state. In this case, the Commonwealth stands in the attitude of an individual. The corporation itself, while retaining the consideration could not maintain a bill in equity to escape from its contracts and conveyance. Chester Glass Co. v. Dewey, 16 Mass. 102, and cases cited. Parish v. Wheeler, 22 N. Y. 502. The Commonwealth, taking only a quitclaim title, take subject to all equities of which they have notice. They succeed to the rights of the corporation and to no more. To hold that the Commonwealth can question this conveyance would be to hold that they have greater rights than their grantor had. This cannot be. Parker v. Nightingale, 6 Allen, 344, 345. Joslyn v. Wyman, 5 Allen, 62. Taylor v. Dean, 7 Allen, 251. Vermont, &c. Railroad v. Vermont Central Railroad, 34 Verm. 1. Morrill v. Noyes, ubi supra. Silver Lake Bank v. North, 4 Johns. Ch. 370.

[Remainder of argument omitted.]

HOAR J. The question whether the mortgage made to the defendants by the Troy and Greenfield Railroad Company is of any validity against the Commonwealth requires the court to give a construction to the provisions of St. 1854, c. 286. To ascertain what the legislature intended to authorize or prohibit by that statute, it will be expedient first to consider what were the powers of railroad companies in relation to the issue of bonds and the making of mortgages at common law, or before the statute was enacted.

There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restricted in this respect by express legislation, or by "the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter." Treadwell v. Salisbury Manuf. Co. 7 Gray, 404.

But in the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the

leading object of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure.

The whole reasoning of the court in the case of Whittenton Mills v. Upton, 10 Gray, 582, in which it was held that a manufacturing corporation has no power to make a contract of co-partnership applies with much greater force to the transfer of its. franchise by a railroad company.

No case has been cited in which the exercise of such a power has ever been judicially sanctioned in this commonwealth, where there was not express legislative authority for it; and the cases in which the legislature has expressly conferred the power, or confirmed its exercise, furnish at once a strong implication that it would not otherwise exist, and afford a solution of the allusion to railroad mortgages which occurs in the statutes.

[The learned Judge then held, that the issue of bonds was in contravention of Statute 1854, chapter 286; and said that "the bonds being invalid, the mortgage to secure them is invalid likewise." The opinion concludes as follows:]

We find no evidence that the Commonwealth has ever known and sanctioned the irregular and illegal issue of the bonds in question, either directly or by implication. Nor do we think that they fall within the class of cases in which it has been held that a violation of corporate powers cannot be taken advantage of collaterally. The second mortgage to the Commonwealth gives it a direct interest in the property, and, not being made expressly subject to any prior incumbrance, gives the right to maintain and prove that the supposed conveyance to the defendants was illegal and void.

The result to which the point decided leads is this: that, the defend

ants having no title which they can maintain against either of the mortgages to the Commonwealth, the plaintiffs have a plain, complete and adequate remedy at law for any interference with the mortgaged property, and the bill must be dismissed.

CHADWICK v. OLD COLONY R. R. CO.

1898. 171 Massachusetts, 239.1

ACTION by the assignee of Wardwell, an insolvent debtor, to recover the sum of \$10,000, previously paid by Wardwell to the defendant. The payment was made under an agreement whereby Wardwell was to purchase from the defendant a note and mortgage given by the Martha's Vineyard R. R. Co. to the defendant.

The mortgage was on the property and franchises of the M. V. R. R. Co. The note and mortgage were given in accordance with the provisions of St. 1874, c. 372, s. 57, which authorizes a railroad corporation to aid in the construction of any "connecting railroad within the limits of this Commonwealth, whether connected by railroad or steamboat lines, by subscribing for shares of stock in such corporation, or by taking its notes or bonds, to be secured by mortgage or otherwise, as the parties may agree."

The note was in terms negotiable, and the mortgage contained a power to the mortgagees to sell the property and franchises at auction for a breach of the conditions of the mortgage. The mortgage was made to two individuals as trustees for the defendant. These trustees were parties to the agreement with Wardwell.

After making partial payments under the agreement, Wardwell failed to pay the balance of the purchase money, and became insolvent. His assignee, Chadwick, sued to recover the sums paid. His contention was, in substance, that such a mortgage as the statute authorizes could not give a title to the road that could pass by a foreclosure or otherwise to the hands of any natural person, or to any railroad company except the one which aided in the construction by taking the notes or bonds.

Knowlton, J. . . . The questions raised in the action at common law involve a consideration of the rights of mortgagees of railroads. Our statutes authorize railroad corporations to mortgage railroads in certain cases, but they do not particularly define the rights of the mortgagees. Pub. Sts. c. 112, §§ 62-80. The general language used implies that their rights are like those of mortgagees of other kinds of property, except so far as they are affected by the provisions of the statutes for the management or use of the property.

It has sometimes been contended that the franchises of a corpora
1 Statement abridged. Only part of the report is given.—ED.

tion cannot be conveyed by mortgage in connection with its property. It is true that the franchise to be a corporation is not assignable, or in any way transferable. The distinction between the franchise to be a corporation, and the franchise to use the corporate property for the purposes for which the corporation was organized, was pointed out by Mr. Justice Curtis in Hall v. Sullivan Railroad, 21 Law Rep. 138, (2) Redf. Am. Ry. Cas. 621,) and has been recognized many times by courts of high authority. In Memphis & Little Rock Railroad v. Railroad Commissioners, 112 U.S. 609, 619, the court says: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation." In the opinion in New Orleans, Spanish Fort, & Lake Railroad v. Delamore, 114 U. S. 501, 509, is this language: "The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them with the corporeal property of the company to the purchaser. It could not be held that, when a mortgage on a railroad and its franchises was authorized by law, the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises." In Bank of Middlebury v. Edgerton, 30 Vt. 182, 190, the court says: "The right to build, own, manage, and run a railroad, and take the tolls thereon is not of necessity of a corporate character or dependent upon corporate rights. may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable." A similar doctrine has been stated or recognized in many other cases. See Morgan v. Louisiana, 93 U. S. 217, 223; Trask v. Maguire, 18 Wall. 391, 409; Chesapeake & Ohio Railway v. Miller, 114 U.S. 176; Jackson v. Ludeling, 21 Wall. 616; Jackson v. Ludeling, 99 U. S. 513; State v. Sherman, 22 Ohio St. 411, 428; Meyer v. Johnston, 53 Ala. 237, 327; Chaffe v. Ludeling, 27 La. An. 607; Willink v. Morris Canal & Banking Co., 3 Green Ch. 377. So far as we are aware, the cases bearing upon the subjects all hold that a mortgage of a railroad and other property of a railroad corporation includes the franchise to use the property This right for the purposes for which it is held by the corporation. will pass to a purchaser at a foreclosure sale, whether the sale is to a corporation or to an individual. A mortgage of property necessarily implies the right in the mortgagee to make the property available. This may be either by a sale or by use. There is no good reason why the right to sell should be restricted to cases in which an existing

railroad corporation is willing to become the purchaser. With such a restriction a mortgage on the property and franchises of a railroad ordinarily could only be made available through an actual use by the mortgagee, or through a contract under the Pub. Sts. c. 112, § 66, with the mortgagor.

- . . . The right to foreclose such a mortgage by a sale, and the right of an individual, as well as a corporation, to purchase at the sale and to transfer to others the title which he acquires, is recognized by the St. 1886, c. 142, § 1, which is as follows: "A purchaser of a railroad at a sale under a valid foreclosure of a legal mortgage thereof, and his grantee and successors in title, shall be subject to all and the same duties, liabilities, restrictions, and other provisions respecting such railroad, or arising from the construction, maintenance, and operation thereof; and have all and the same powers and rights relating to said railroad, and the construction, maintenance, and operation thereof, which the corporation by which said mortgage was made was subject to, and had at the time of said sale." This statute is declaratory of the law as it exists without legislation in other jurisdictions, and as doubtless it would have been held to be in this Commonwealth upon general principles before the enactment of the statute. It follows that the agreement under which the payments were made by Wardwell was not contrary to public policy, and it gave him equitable rights in the mortgaged property and franchises that furnish a valuable consideration for his payments. It also follows that the original mortgage was not illegal in that it was made to secure a negotiable promissory note.
- . . . The fact that St. 1874, c. 372, § 57, (Pub. Sts. c. 112, § 80,) in authorizing the making of mortgages of railroads, does not expressly mention their franchises, is immaterial. The franchise to use the railroad and its appurtenances goes with the railroad by implication when an entire railroad is conveyed. That a mortgage can be made originally only to a connecting railroad under this statute does not indicate that the mortgagee can make it available only by operating the railroad, and that the franchises cannot be used by a purchaser. So to hold would put a limitation upon the mortgage, for which there is no warrant in the statute.

The grounds upon which the plaintiff seeks to recover are untenable.

Judgment for defendant.

J. H. Benton, Jr., for R. R. Co.

W. H. Cobb & L. LeB. Holmes, for Chadwick.

PITTSBURGH, C. C. & ST. L. R. CO. v. STICKLEY.

1900. 155 Indiana, 312.1

From the Randolph Circuit Court.

The controversy related to the ownership of land, conveyed to the railway company in 1866. "This land the company intended to use for depot purposes, but has not done so." The original plaintiff, Stickley, claimed title by adverse possession for twenty-five years. Judgment below for Stickley, and the R. R. Co. appealed.

N. O. Ross and G. E. Ross, for appellant.

J. S. Engle and W. G. Parry, for appellee.

BAKER, C. J. [After stating the case, and disposing of other points.] Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defense to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officers are not governmental agents whose laches creates no bar. It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists. Farmers, etc., Co. v. Canada, etc., R. Co., 127 Ind. 250, 11 L. R. A. 740. If a company voluntarily disable itself to perform its duties to the public, its charter may be forfeited. But there is no reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation. It is true that the statute entitles a railway company to take land in fee and forbids interference with the company's exclusive use. But the right to the exclusive use (which is an incident to every unqualified ownership) must be asserted. If one occupies adversely for twenty years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain as a private proprietor. The State confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the State should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents. Illinois, etc., R. Co. v. Houghton, 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213;

¹ Statement abridged. Only part of the case is given. - ED.

Illinois, etc., R. Co. v. O'Connor, 154 Ill. 550, 39 N. E. 563; Illinois, etc., R. Co. v. Moore, 160 Ill. 9, 43 N. E. 364; Donahue v. Illinois, etc., R. Co., 165 Ill. 640, 46 N. E. 714; Illinois, etc., R. Co. v. Wakefield, 173 Ill. 564, 50 N. E. 1002; Matthews v. Lake Shore, etc., R. Co., 110 Mich. 170, 67 N. W. 1111; Bobbett v. South Eastern R. Co., L. R. 9 Q. B. Div. 424; Norton v. London, etc., R. Co., L. R. 13 Ch. Div. 268; Erie, etc., R. Co. v. Rousseau, 17 Ont. App. 483.

Judgment affirmed.

Collins, J., in NORTHERN PACIFIC R. CO. v. TOWNSEND.

Supreme Court of Minnesota, July 12, 1901. 86 Northwestern Reporter, 1007, pp. 1009, 1010.

Collins, J. . . . The real object of this statute of limitations is to prevent litigation, and to quiet title to land which has remained in the possession of another adversely and in hostility to its true owner for the specified period of time. Such a law is a continual and decisive notice to owners that, if they allow others to adversely occupy, use, and improve their land for fifteen years continuously, they must be deemed to have acquiesced in the assertion of the occupants' claim of right to use the same, and to have abandoned all opposition thereto. There may be exceptional instances in which the nature of the right affected or the character of the party in whom the title is vested will prevent the operation of the statute, but the facts here do not come within the exception. That a railway company may be deprived of a part of its right of way by adverse occupation for the statutory period of time, and that such an occupation will bar its right to eject its adversary, has often been determined by the courts of this country. Railway Co. v. Stickley, 155 Ind. 312, 58 N. E. 192; Matthews v. Railway Co., 110 Mich. 170, 67 N. W. 1111; Littlefield v. Railroad Co., 146 Mass. 268, 15 N. E. 648; Railroad Co. v. Wakefield, 173 III. 564, 50 N. E. 1002, and cases cited. See, also, upon this subject, 15 Harv. Law Rev. 146. It has also been decided that it is immaterial whether title is held by the company in fee simple, or is a mere easement, or a qualified fee, or an absolute fee; for, whichever it is, the right conferred is a possessory one, and sufficient to sustain an action of ejectment. Nor is it material whether the statute under which the defendant's claim is regarded as one indulging in the presumption of a grant by the true owner or is simply a statute of repose. We have held that it is the latter in Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060. We have also decided that real property belonging to municipal corporations and quasi public corporations can be lost under the statute by adverse possession. City of St. Paul v. Chicago M. & St. P. Ry. Co. 45 Minn. 387, 48 N. W. 17; St. Paul, M. & M. Ry. Co. v. City of Minneapolis, 45 Minn. 400, 48 N. W. 22; Village of Wayzata v. Great

Northern Ry. Co., 50 Minn. 438, 52 N.W. 913.1 Municipal corporations hold real property for public use and for public purposes in a greater sense than do railway companies hold their right of way. There is no reason whatever for determining that the former are subject to the operation of the statute, and at the same time hold that the latter are exempt from the operation of the same law. Such a conclusion would take front rank among the legal absurdities.

. . . No matter what rights the beneficiary of the grant may have to use and occupy, if it so chooses, its right of way over and through public domain to the full extent of 400 feet, it is obvious that it must take this right subject to the statute relating to adverse possession. No other conclusion can be tolerated. . . . ²

SECTION IV.

Power to borrow Money. Power to issue Negotiable Notes.8

BRADBURY v. BOSTON CANOE CLUB.

1891. 153 Massachusetts, 77.

HOLMES, J. This is an action upon a promissory note for one hundred and fifty dollars and interest, given by the defendant to the plaintiff for money lent to it by the plaintiff to be used in building a club-house. There is a second count for money lent. At a meeting, duly called, the corporation passed a vote authorizing its treasurer to borrow money in terms sufficiently broad to cover the loan in question. The suggestion that no sufficient notice of the business to be transacted was given, does not seem to us fairly open on the agreed facts. Moreover, it would be impossible to argue that the defendant had not recognized and ratified the act of its treasurer in borrowing from the plaintiff.

1 But see 1 Dillon, Mun. Corp. 4th ed. s. 675. — ED.

2 In the same direction is Midland R. Co. v. Wright, L. R. (1901), 1 Chan. 738.

For a different view, see Southern Pacific R. Co. v. Hyatt, California, 1901, 64 Pacific

În Sapp v. Northern Central R. Co., 1878, 51 Maryland, 115, it was held, that an easement of a footway by the side of a railroad track cannot be acquired by prescription. So in Canadian Pacific R. Co. v. Guthrie, Supreme Court of Canada, Feb. 19, 1901, it was held, that user of a way across (or under) a railway line "could never ripen into a title by prescription of the right of way." 37 Canada Law Journal, 272. - ED.

8 Logically, a discussion of the question whether a corporation has power to incur any indebtedness at all should precede the discussion as to its power to incur indebtedness in

the form of borrowing.

It is generally assumed that corporations are not bound to do a strictly cash business; but are impliedly authorized to incur debts, in the ordinary way of business, for objects within the scope of the corporate purposes as defined by the charter. See Green's Brice's Ultra Vires, 2d Am. ed. pp. 207, 208. And "a limitation upon the right of a corporation to borrow money does not necessarily restrict the right of the company to incur debts in the course of its usual business." 1 Morawetz, Corp. 2d ed. s. 344. - Ep.

The money was received by the corporation, and was used by it for the purpose mentioned. The only question for us is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club-house upon land of which it held a lease.

The defendant is a corporation formed under the Pub. Sts. c. 115, § 2, for encouraging athletic exercises. By § 7 it "may hold real and personal estate, and may hire, purchase, or erect suitable buildings for its accommodation, to an amount not exceeding five hundred thousand dollars," etc. We are of opinion that under these words the defendant had power to take a lease of land and to erect a suitable club-house upon it. Having this power, it was entitled to raise money for the purpose. No argument is needed to show that the power at the end of § 7, to receive and hold in trust funds received by gift or bequest, does not confine the corporations to that mode of raising it. Borrowing money is a usual and proper means of accomplishing what the statute expressly permits. See Fay v. Noble, 12 Cush. 1, 18; Morville v. American Tract Society, 123 Mass. 129, 136; Davis v. Old Colony Railroad, 131 Mass. 258, 271, 275. As this is a sufficient reason for giving the plaintiff judgment, it is unnecessary to consider whether there are Judgment for the plaintiff. not others.

- C. J. McIntire & F. Hunt, for the plaintiff.
- C. H. Sprague, for the defendant.

BATEMAN v. MID-WALES RAILWAY CO. NATIONAL, &c., CO. v. SAME. OVEREND, GURNEY, & CO. (LIMITED) v. SAME.

1866. Law Reports, 1 Common Pleas, 499.

These were actions brought by the respective plaintiffs against the defendants, a railway company, incorporated under the 22 & 23 Vict. c. lxiii., the 5th section of which prescribed the limit of their capital (170,000*l*.), and the 7th and 9th the mode of raising it; the 37th and 38th impowered them to contract for working the traffic upon the railway, and the 1st section incorporated the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); but there was no provision in terms impowering them to draw, accept, or indorse bills of exchange or promissory notes.

The declaration in each case charged the company as the acceptors of several bills of exchange, drawn respectively by John Watson & Co.,

¹ Arguments omitted; also the concurring opinions of BYLES J., and KEATING J.—ED.

and purporting to be accepted in the following form: — "Accepted by order of the board of directors, and payable at the Agra and Masterman's Bank. John Wade, secretary," with the seal of the company annexed. It was proved (or admitted) in each case, that the company had actually commenced business as a railway company, and that there was a resolution of a board of directors authorizing the acceptance of the bills in question, as above.

Under the plea traversing the acceptance, it was contended on the part of the defendants, at the trial before Erle, C. J., at the sittings in London after last Hilary Term, that the company had no power by law to accept bills of exchange; and further, that, assuming that they had such power, the bills declared on were not accepted in such form as to be binding on them.

His Lordship directed verdicts to be entered for the plaintiffs in each action, reserving leave to the defendants to move to enter nonsuits if the Court should think the objections or either of them well founded.

Karslake, Q.C., obtained rules nisi.

E. James, Q.C., and Sir G. Honyman, for plaintiffs in first and second actions.

Karslake, Q.C., and Holland, for the defendants.

Bovill, Q. C., and Mathew, for plaintiffs in third action.

ERLE, C.J. These were actions by the indorsees against the acceptors of several bills of exchange. The defendants pleaded in each action that they did not accept. It appeared that the defendants are a company incorporated by an act of 22 & 23 Vict. c. Ixiii. for the purpose of making and working a railway in Wales. The precise purposes for which they are incorporated, and the powers which are intrusted to them, are limited and defined by the special act and the provisions of the general acts incorporated therewith. I take it to be well established that a corporation established for a specific purpose cannot bind itself by a contract which is entirely unconnected with the purposes of its incorporation. The question then is, whether this company, being a corporation created for the specific purpose of making a railway, can lawfully bind itself by accepting a bill of exchange. I am of opinion that it cannot. The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any indorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad, - or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loan beyond their borrowing powers. It would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by

an indorsee, but in repect of the latter not. So much for the general bearing of the question upon principle. How stands the matter as to authority? Subject to three exceptions, I find no case in which an action upon a bill of exchange or promissory note has been sustained against a corporation: and these exceptions prove the rule. In Slark v. Highgate Archway Company, the company was impowered by its act of parliament to accept bills for the specific purpose: and in the cases of the Bank of England and the East India Company, the negotiation of bills and notes was within the very scope and object of their incorporation. In no other case that I am aware of has the liability of a corporation ever been enforced. In Broughton v. Manchester Waterworks Company,2 the doctrine I have stated is laid down in general terms: and Bayley, J., entertained a doubt whether the holder of a bill of exchange accepted by a corporation could sue the corporation without shewing that the acceptance was given for a purpose for which it was competent to the corporation to accept. That proposition derives much more force when applied to the case of a corporation created for a specific purpose, as we have judicial notice from the act of parliament that this is. Upon both principle and authority, therefore, I am of opinion that the acceptances given by this company are not binding acceptances, and that the plea is established.

MONTAGUE SMITH, J. I am of the same opinion. The plaintiffs are indorsees, and not immediate parties to these bills, and therefore cannot recover unless the bills are in their inception valid instruments. I am clearly of opinion that it was not within the competency of this company to accept bills. It is a company incorporated for the formation of a railway, with a limited capital and limited powers of borrowing money. If such a company had power to accept bills of exchange, the consequence would be either that they might bind themselves by acceptances to an unlimited extent, or there must in each case be an inquiry whether the bill was given for the payment of a just debt, or for a purpose not warranted by their incorporation. I think that it was not the intention of the legislature that they should accept bills at all. The shareholders advance their money upon the faith of the limited borrowing powers. This limit would be illusory if the directors could be held bound by acceptances. There is no authority to shew that they have power to accept, and there is much authority in analogous cases the other way. It has been held that mining companies, waterworks companies, gas companies, salt and alkali companies, and many others, all more in the nature of trading companies than this company, are incapable of drawing, accepting, or indorsing bills of exchange. The first object of a railway is the making of a railway, though they may and practically always do carry on the business of carriers. That corporations created for the purpose of trading may have power to issue negotiable instruments is the well-known exception. But that applies where the pri-

mary object of the incorporation is the carrying on of trade as other persons carry it on, viz. by buying and selling. In addition to the cases already referred to, there is the distinct authority of many eminent text-writers that a railway company cannot accept. I will refer to one considerable authority, the late J. W. Smith. In his treatise on Mercantile Law, after speaking of the disability of corporations in general to accept bills he says:1 " However, it has been considered that a trading corporation may differ from others as to its powers of contracting, and its remedies on contracts relating to the purposes for which it was formed. Thus, such a corporation may in some cases bind itself by promissory notes and bills of exchange; and it was even held that the Bank of England might without deed appoint an agent for such purposes. But a corporation will not have these extraordinary powers unless the nature of the business in which it is engaged raises a necessary implication of their existence." No express power to accept is given to this company: nor is there, in my judgment, any necessary implication from the purposes for which it was created. For these reasons, I am of opinion that the rule in each of these actions Rules absolute to enter a nonsuit. should be made absolute. Marshell, Sec. 67.

UNION BANK v. JACOBS.

1845. 6 Humphrey (Tennessee), 515.2

Contractor of

Surr against Jacobs, as endorser of the negotiable note of the Hiwassee Rail Road Company.

By Act of the Tennessee Legislature, in 1835-6, the Hiwassee R. R. Co. was created a body corporate, with perpetual succession, with power to sue and be sued, and to possess and enjoy all the rights, privileges and immunities, with power to make such by-laws, ordinances, rules, and regulations, not inconsistent with the laws of this State and the United States, as shall be necessary to the well ordering and conducting the affairs of said company.

By the 2d section, the capital stock was declared to be \$600,000, and the corporate powers were to commence when \$400,000 were subscribed.

By the 4th section, after 4000 shares shall have been subscribed, there was to be paid on each share such sum as the company might direct, and in such instalment, not exceeding one fourth of the subscriptions in any one year.

By the 12th section, if the capital stock of the company be found insufficient for the purposes of the road, the company may enlarge it from time to time, so as not to exceed in the whole \$1,500,000, and new subscriptions for that purpose to be opened.

¹ 7th ed. by Dowdeswell, pp. 105-6.

² Statement abridged. — ED

By the 13th section, the president and directors are invested with all the powers and rights necessary for the building, constructing, and keeping in repair of the railroad; and they may cause to be made, or contract with others for making of said road or any part thereof.

Under the provisions of the charter, the company was legally organized and proceeded to construct the road. The company became in debted to Lonergin, a contractor, for grading the road, in the sum of \$5000. For the payment of this debt, the company, by its president, Jacobs, executed its promissory note to Jacobs, negotiable and payable at the Union Bank four months after date. The note was indorsed by Jacobs to Trautwine, and by him to the Union Bank, and the proceeds were passed by the bank to the credit of Lonergin. At maturity the note was protested, and notice given to the endorsers. Suit was brought against Jacobs as endorser. The circuit Judge charged the jury "that the note was drawn by the Hiwassee Rail Road Company in violation of its corporate powers; that it was therefore null and void; and that the plaintiffs were not entitled to recover."

Verdict for defendant, and judgment. Plaintiff brought error. Lyon, for plaintiff.

W. Swan, Maynard, and Sneed, for defendant.

Turley, J. [After stating the facts.] It is contended against the plaintiff's right to recover, that there is no power given, either expressly or by necessary implication, by the charter to the Hiwassee Rail Road Company, to borrow money or to execute promissory notes; and that, therefore, the note executed and endorsed to the Bank is void, both as against the maker and endorsers, and that no action can be maintained against them thereon.

The construction of the powers of corporations has been a fruitful source of litigation, both in the courts of Great Britain and the United States. In the earlier cases they were construed with great strictness, and a stringent rule, as to the mode of exercising them enforced.

Whatever of strictness may have existed in the earlier cases, in restricting their power of contracting to the express grant of authority, has been also greatly relaxed, and the doctrine upon the subject been made more conformable to reason and necessity, the powers granted to corporations being now construed like all other grants of power, not according to the letter, but the spirit and meaning. In Angell & Ames on Corporations, page 192, sec. 12, it is said, "a corporation having been created for a specific purpose, can not only make no contracts forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular con-

¹ The above is the charge as recited in the opinion of the Supreme Court. The statement by the reporter says that the Judge charged "that the Hiwassee Company had no power to borrow money, and that the note given in execution of a void contract was null and void also."—ED.

tract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfil the purpose of its existence, or, whether the contract is entirely foreign to that purpose. In general, an express authority is not indispensable to confer upon a corporation the right to become drawer, endorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper. is sufficient, if it be implied as the usual and proper means to accomplish the purposes of the charter. — Chitty on Bills, 5th Ed. 17 to 21; Baily on Bills, ch. 2, sec. 7, p. 69 (5th Ed.) Story on Bills of Exchange. sec. 79, p. 94." In the case of Munn vs. Commission Co., 15th Johnson 52, Spencer, J., who delivered the opinion of the court, says: "It has been strongly urged, that, under the act incorporating this company, they could neither draw nor accept bills of exchange. Their power is undoubtedly limited; they are required to employ their stock solely in advancing money, when required, on goods and articles manufactured in the United States, and the sale of such goods and articles on commission. The acceptance of a bill is an engagement to pay money; and the company may agree to pay or advance money at a future day, and they may engage to do this by the acceptance of a bill." When a charter or act of incorporation and valid statutory law are silent as to what contracts a corporation may make, as a general rule, it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. The creation of a corporation for a specific purpose, implies a power to use the necessary and usual means to effectuate that purpose. — Angell & Ames on Corp. 200, sec. 3.

Mr. Story, in his treatise on bills of exchange, p. 95, speaking of the power of corporations to draw, endorse, and accept bills of exchange, says: "it is sufficient if it be implied as a usual and appropriate means to accomplish the objects and purposes of the charter. But when the drawing, indorsing or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, then the act becomes a nullity, and not binding on the corporation."

In the case of the People vs. the Utica In. Co., 15th Johns., Thompson, Chief J., who delivered the opinion of the court, says, at page 383, "an incorporated company has no rights but such as are specially granted, and those that are necessary to carry into effect the powers so granted."

In the case of Mott vs. Hicks, a quantity of wood was purchased for the president and directors of the Woodstock Glass Company, by Whitehead Hicks, the president thereof, for which he executed the promissory note of the company at six months. It appears, from a reference in argument to the charter of the company, that there was no clause authorizing it to issue bills or notes, or making such, if issued, binding and obligatory upon the company; yet it was held by the court, that an action would lie against the corporation upon the note, it having been executed by its legally authorized agent, acting within the scope of the legitimate purposes of such corporation. — 1st Cowen 513.

In the case of Hayward vs. the Pilgrim Society, 21st Pick. 270, it was held that the trustees of a society incorporated for the purpose of building a monument, in virtue of their authority to manage the finances and property of the society, were held competent to bind the society by a promissory note through the agency of their treasurer.

These authorities fully establish the proposition, that in the construction of charters of corporations, the power to contract, and the mode of contracting, is not limited to the express grant, but may be extended by implication to all necessary and proper means for the accomplishment of the purposes of the charter. Now, what are necessary and proper means? Mr. Story, as we have seen, says, if the means are usual and appropriate, the implication of power arises. — Story on Bills, 95.

Chief Justice Marshall, in the case of McCullock vs. the State of Maryland, 4th Wheaton 413, says: "But the argument on which most reliance is placed, is drawn from the peculiar language of this clause of the constitution. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be necessary and proper for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves Congress, in each case, that only which is most direct and simple. Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of the human mind, that no word conveys to it, in all situations, one single, definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words, which import something excessive, should be understood in a more mitigated sense - in that sense which common usage justifies.

The word 'necessary' is of this description. It has no fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phases." conclusion upon this subject, he says, page 421, same case: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Now, if this be true doctrine in relation to the constitution of the United States, surely it will not be contended that a more stringent rule will be applied in the construction of the powers of a corporation, than is applied in the construction of the powers of Congress under the constitution of the United States.

To apply these principles as established by the authorities cited, to the case under consideration. The Hiwassee Rail Road Company is chartered to construct a rail road, a thing of itself necessarily involving a heavy expenditure of money; but in addition thereto, it is empowered to sue and be sued, to acquire and hold, sell, lease and convey estates real, personal and mixed, which necessarily involves the power of making contracts for the same. How shall these contracts be made, both for the construction of the road and the purchase of the property? It is argued, that the capital stock of the company is the only means provided for the payment, and that no other can be resorted to for that purpose; or, in other words, that it must pay cash for every contract, for that no power is given by which it may contract upon time; for if it may create a debt, of necessary consequence, it may create written evidences of that debt, and these may be either promissory notes or bills of exchange. It is true, that the capital stock of the company is the source from whence an ultimate payment of the debts of the company must be made, but to hold that a sufficient amount of this stock must always be on hand, to pay immediately for every contract made, would be destructive of the operations of the company. By the provisions of the charter, not more than one fourth of the stock shall be called for in any one year, and this upon thirty days notice; and if, within thirty days after such notice, the amount called for be not paid, the company is authorized to take steps against the delinquent stockholders, to enforce payment. Now, it is obvious that it never was intended that all the stock should be paid in before the company commenced operations

The early completion of the road was a desirable object for commercia purposes, and can it be pretended, that the expenditures of the company were to be limited and restricted to the amount of capital actually paid in by the stockholders, and that under no circumstances were the company to exceed them? If, upon a failure of the means on hand, the stockholders should neglect to pay upon a proper call, are the works to be suspended until such time as payments could be enforced? Are the persons who may have done work for it, and for which they have not been paid, to wait the slow process of the law before they can receive satisfaction? And shall the company not be permitted to use its credit in such emergency? It is so argued for the defendant. This construction of the charter would be ruinous in its consequences. The company might be compelled to suspend all operations at a time when great loss would result from deterioration to unfinished work, and be greatly injured also in its credit.

The restriction contended for is too refined and technical. It might have suited the days of the Year Books, when it was held that a corporation could contract for nothing except under its corporate seal; but it is strange that it should be urged at this day of enlightened jurisprudence, when the substance of things is looked to rather than forms. A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing.

There is no principle which prevents a corporation contracting debts within the scope of its action; and, as has been observed, if it may contract a debt, it necessarily may make provision for its payment, by drawing, or endorsing, or accepting notes or bills. It is not pretended that this power extends to the drawing, endorsing or accepting bills or notes generally, and disconnected from the purposes for which the corporation was created.

The corporation, in the present case, was indebted to one of its contractors for work done upon the road, for the payment of which, the note in question was drawn. This, upon principle and authority, was a usual and appropriate means for accomplishing the object and purposes of the charter, viz: the construction of the road. Not only do all the elementary writers sustain this view of the subject, but as we have seen, there are three adjudicated cases in courts of high authority directly in its favor. The case of Munn vs. Commission Company, 15th John. 52; the case of Mott vs. Hicks, 1st Cowen, 513; and the case of Hayward vs. the Pilgrim Society, 21st Pickering, 270.

There has not been produced a single case to the contrary. The cases cited relied upon are decided upon different grounds entirely.

[The learned Judge here commented upon the cases relied upon by the defendant.]

We are then of opinion, (to use the words of Chief Justice Marshall, in the case of McCullock vs. the State of Maryland,) that the end proposed by the Hiwassee Rail Road Company, in executing the note in question, was legitimate, and within the scope of its charter; that as a means it was appropriate, and plainly adapted to that end, which is not prohibited, but consistent with the letter and spirit of the charter and therefore not void, but binding and effectual upon the company and the endorsers.

Let the judgment of the circuit court be reversed, and the case be

remanded for a new trial.1

SECTION V.

Power to make By-Laws.

HOBART, C. J. [?], IN NORRIS v. STAPS.

1614-1625 [?]. Hobart's Reports, p. 211 a.

Now I am of opinion, that though power to make laws is given by special clause in all incorporations, yet it is needless; for I hold it to be included, by law, in the very act of incorporating, as is also the power to sue, to purchase, and the like. For, as reason is given to the natural body for the governing of it, so the body corporate must have laws, as a politic reason to govern it; but those laws must ever be subject to the general law of the realm, as subordinate to it. And therefore, though there be no proviso for that purpose, the law supplies it.

¹ The reporter has printed, as an appendix to this case (pp. 528-532), an opinion given by Ex-Chancellor Kent, of New York, as counsel. He came to the conclusion that the company had not power to borrow money; and that the notes, being illegal and impliedly prohibited, could not be enforced against any of the parties thereto.

After stating the substance of the charter provisions, Chancellor Kent said (inter alia): "Here we have the delineation of the powers of the company, and it cannot but strike any attentive reader of the act, that those powers are very specially designated and confined within strict and narrow limits. The road is to be made out of capital or funds raised by subscriptions, and to be called for from time to time, under reasonable and guarded checks, from the subscribers or stockholders. The power of acquiring and making the road, the extent of the expenditures to be bestowed in making it, the source from which the moneys requisite for the work are to be procured, and the manner in which they are to be raised, are all declared in the charter with a certainty and precision that cannot be mistaken; and here we may confidently conclude that the charter contains no power in the president and directors to borrow money upon loan, or to give their promissory notes to the lender of money, for the purpose of making the road and carrying into effect the object of the charter. The mode of raising the funds, and the limitation to the amount of those funds, are specifically prescribed, and all the other modes are necessarily excluded.

"That it is an established and deemed a salutary rule in the construction of corporate powers, where the charter is for special purposes, and the powers and the manner of executing them specially designated, that no other powers and no other mode of exercising the powers granted can be deemed lawfully to exist, I would refer to the English and American cases." — ED.

CHAPTER IX.

MODE OF CONTRACTING AND OF APPOINTING AGENTS.

HORNE v. IVY.

20 Car. 2. 1 Modern, 18.

TRESPASS for taking away a ship. The defendant justifies as servant under the patent whereby *The Canary Company* is incorporated, and whereby it is granted, "That none but such and such should trade thither, on pain of forfeiting their ships and goods, &c." and says, that the defendant did trade thither, &c. The defendant demurs.

Pollexfen for the plaintiff contended, that the defendant ought to have shewn the deed whereby he was authorized by the Company to seize the goods; 1 though he agreed, that for ordinary employments and services a corporation may appoint a servant without deed, as a cook, a butler, &c.2 A corporation cannot license a stranger to fell trees without deed.3 Nor can they make a disseisor without deed, nor deliver a letter of attorney without deed.4 Secondly, The plea is double; for the defendant alledges two causes of a breach of their charter, viz. their taking in wines at the Canaries, and importing them here; which is double. Then there is a clause that gives the forfeiture of goods and imprisonment, which cannot be by patent.5 This patent I take also to be contrary to some acts of parliament, viz. 2. Edw. 3. c. 1. 2. Edw. 3. c. 2. 2. Rich. 2. c. 1. 11. Rich. 2. c. 2; and these statutes the king cannot dispense withal by a non obstante.

Twisden, Justice. For the first point, I think, they cannot seize without deed, no more than they can enter for a condition broken without deed.

Kelynge, Chief Justice. We desire to be satisfied, Whether this is a monopoly or not? — It was ordered to be argued again.

- ¹ 26, Hen. 6. pl. 8. 14 Edw. 4. pl. 8. Bro. "Corporation" 59.
- ² Plowd. 95.
- 8 12. Hen. 4. pl. 17.
- ⁴ 9. Edw. 4. pl. 59. Bro. "Corporation," 24. 34. 14. Hen. 7. pl. 1. 7. Hen. 7. pl. 9. 1. Roll. Abr.
 - ⁵ 8. Co. 125. Noy, 123.
- 6 It appears in Keble and Ventris, that judgment was given in this case for the plaintiff, on the first objection, because the defendant justified by the command of a corporation, without shewing that his authority to seize the ship was by a deed; and S. C. Siderfin says, that the Court also held the bar bad in substance, because the king by his patent cannot create a forfeiture for the doing those things which his patent prohibits. See 3. Peer. Wms. 424. Hardres, 55. Skinner, 135, 224. 8. Co. 125. Palmer, 5. 3. Lev. 353. 1. Salk. 32. 5. Com. Dig. "Trade," (B.). 1. Burr 526. 1. Term Rep. 118.

MARSHALL, C. J., IN BANK OF U. S. v. DANDRIDGE.

1827. 12 Wheaton, 64.

[In this case the majority of the Court held, that the acceptance of a cashier's bond by the board of directors of a bank may be proved without the production of a written record; and that, although there was no recorded vote of acceptance, the acceptance might be proved by evidence of the facts that the person acted as cashier and was recognized as such by the directors, and that the bond was required to be given as a condition precedent to his so acting, and was actually found among the corporate documents.

MARSHALL C. J., delivered a dissenting opinion, from which the following extracts have been made.]

MARSHALL C. J.

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The plaintiff is a corporation aggregate; a being created by law, itself impersonal, though composed of many individuals; these individuals change at will; and, even while members of the corporation, can, in virtue of such membership, perform no corporate act, but are responsible in their natural capacities, both while members of the corporation and after they cease to be so, for every thing they do, whether in the name of the corporation, or otherwise. The corporation being one entire impersonal entity, distinct from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature.

Can such a being speak, or act otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will. The voice which utters it must be the aggregate voice. Human organs belong only to individuals. The words they utter are the words of individuals. These individuals must speak collectively to speak corporately, and must use a collective voice. They have no such voice, and must communicate this collective will in some other mode. That other mode, as it seems to me, must be by writing.

A corporation will generally act by its agents; but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing.

If, then, corporations were novelties, and we were required now to devise the means by which they should transact their affairs, or communicate their will, we should, I think, from a consideration of their nature, of their capacities and disabilities, be compelled to say, that where other

means were not provided by statute, such will must be expressed in writing.

But they are not novelties. They are institutions of very ancient date; and the books abound with cases in which their character and their means of action have been thoroughly investigated. In Brooke's Abridgment (title Corporation), we find many cases, cited chiefly from the Year Books, from which the general principle is to be extracted. that a corporation aggregate can neither give nor receive, nor do anything of importance, without deed. Lord Coke, in his commentary on Littleton (66 b.), says: "But no corporation aggregate of many persons capable can do homage." "And the reason is, because homage must be done in person, and a corporation aggregate of many cannot appear in person; for, albeit, the bodies natural, whereupon the body politic consists, may be seen, yet the body politic or corporate, itself, cannot be seen, nor do any act, but by attorney." So, too, a corporation is incapable of attorning otherwise than by deed (6 Co. 386), or of surrendering a lease for years (10 Co. 676), or of presenting a clerk to a living (Br. Corp. 83), or of appointing a person to seize forfeited goods (1 Vent. 47), or agreeing to a disseisin to their use (Br. Corp. 34). These incapacities are founded on the impersonal character of a corporation aggregate, and the principle must be equally applicable to every act of a personal nature.

Sir William Blackstone, in his Commentaries (v. 1, p. 475), enumerates, among the incidents to a corporation, the right "to have a common seal." "For," he adds, "a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse. It therefore acts and speaks only by a common seal. For though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."

Though this general principle, that the assent of a corporation can appear only by its seal, has been in part overruled, yet it has been overruled so far only as respects the seal. The corporate character remains what Blackstone states it to be. The reasons he assigns for requiring their seal as the evidence of their acts, are drawn from the nature of corporations, and must always exist. If the seal may be exchanged for something else, that something must yet be of the same character, must be equally capable of "uniting the several assents of the individuals who compose the community, and of making one joint assent of the whole." The declaration that a seal is indispensable, is equally a declaration of the necessity of writing; for the sole purpose of a seal is to give full faith and credit to the writing to which it is appended. The seal in itself, not affixed to an instrument of writing, is nothing; is meant as nothing, and can operate nothing. The writing is the substance, and the seal appropriates it to the corporation.

The English cases on this subject are very well summed up by Mr. Kyd, p. 259. The result of the whole appears to be, that in England the general rule is that a corporation acts and speaks by its common seal, at least so far as respects the appointment of officers, whose duties and powers are important. In those transactions where the use of the seal would be unnecessary and extremely inconvenient, it is frequently dispensed with; but in all of them, I think, writing is indispensable. In almost every case which I can imagine, there ought to be and is a record in the corporation books. With respect to the necessity of a seal, the difference is certainly great between ancient and modern times; and between corporations whose principal transactions respected land, and those which are commercial in their character. This distinction may and ought to influence the use of the seal, but not the use of writing. The inability of a corporation aggregate to speak or act otherwise than by writing, is constitutional, and must be immutable, unless it be endowed by the legislature with other qualities than belong to the corporate character. The English cases, so far as I have had an opportunity of examining them, concur in the principle that a corporation aggregate can act only by writing.

When a being is created without the organs of speech, and endowed only with the faculty of communicating its will by writing, we need not look in the laws given by its creator for a prohibition to speak or a mandate to write. These are organic laws which it is compelled to observe. If we find, in the act of its creation, an enumeration of duties and powers which are to be performed and exercised by writing, it is evidence that the creator considered it as certain that the creature would write, and that the evidence of its conformity to the will of the creator would be found in writing. It is equivalent to a declaration that it shall act by writing.

BANK OF COLUMBIA v. PATTERSON'S ADMINISTRATOR.

1813. 7 Cranch, 299.1

Error to the Circuit Court for the District of Columbia.

Indebitatus assumpsit by Patterson's Adm'r against the Bank of Columbia. In 1804, a written agreement was made between Patterson and a committee of the directors, whereby the committee agreed to pay Patterson for carpenter work which he was to do upon a new bank building agreeably to a certain plan and in a particular manner. In 1807, a sealed agreement was entered into between Patterson and a

¹ Statement abridged. Part of opinion omitted. - ED.

committee of the directors, under their private seals. It recites, that a difference of opinion had arisen between Patterson and the committee for building the new banking-house, as to certain work extra of an agreement made between Patterson and the said committee, in 1804, and thereto annexed; whereupon it was agreed, that all the work done by Patterson should be measured and valued by two persons therein mentioned, according to certain rates, called in Georgetown old prices, and the sum certified by them should be taken by both parties, in their settlement, as the amount thereof. It was also thereby agreed, that the outhouses, respecting which there had been no specific agreement, should be measured and valued by the same persons in the same manner.

Evidence was offered as to the work done, including a paper of particulars of the work, certified by the persons named in the agreement of 1807. It was proved that, while the work was going on, the defendants paid Patterson sundry large sums of money on account thereof.

Defendants requested an instruction that the plaintiff was not entitled to recover, which was refused.

Defendants also asked an instruction — that the plaintiff could not recover, unless he should prove that the defendants, after the measurement and valuation, expressly promised to pay the amount thereof to the plaintiff; and that the jury could not, from the evidence offered, presume any such promise. This request was also refused.

Morsell and Key, for plaintiffs.

Jones and C. Lee, for defendants.

Story, J. [The court overruled various objections. Among other points they held: 1st, that indebitatus assumpsit will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that it is not in such case necessary to declare upon the special agreement: 2d, that a promise which would be implied by law for the extra work, against the corporation, was not extinguished, by operation of law, by the provisions of the sealed contract of 1807; the said sealed instrument merely recognizing an existing debt, and providing a mode to ascertain its amount and liquidation.

After deciding the above and other points, the opinion proceeds as follows:]

The case has thus been considered all along, as though the contracts were made between the plaintiff's administrator and the corporation, and indeed some points in the argument have proceeded upon this ground. It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee, in their own names. In consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A question has therefore occurred, how far the corporation were capable of contracting, except under their corporate seal; and if it were capable, as no special agreement is found in

the case, how far the facts proved show an express or an implied contract on the part of the corporation.

Anciently, it seems to have been held, that corporations could not do anything without deed. 13 H. 8, 12; 4 H. 6, 7; 7 H. 7, 9.

Afterwards, the rule seems to have been relaxed, and they were, for conveniency's sake, permitted to act in ordinary matters without deed; as to retain a servant, cook, or butler. Plow. 91, b.; 2 Sand. 305; and gradually this relaxation widened to embrace other objects. Bro. Corp. 51; 1 Salk. 191; 3 Lev. 107; Moore, 512. At length, it seems to have been established, that though they could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. 'Rex v. Bigg, 3 P. Wms. 419; and courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal, 1 Fonb. 296, Phil. ed. note (o.) The sole ground upon which such an agreement can be enforced, must be the capacity of the corporation to make an unsealed contract.

As it is conceded, in the present case, that the committee were fully authorized to make agreements, there could then be no doubt, that a contract made by them in the name of the corporation, and not in their own names, would have been binding on the corporation. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff, except against the committee.

The technical doctrine, that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it \ would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of / the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court, that adjudged cases fully support the position. Bank of England v. Moffat, 3 Bro. Ch. Rep. 262; Rex v. Bank of England, Doug. 524, and note ib.; Gray v. Portland Bank, 3 Mass. Rep. 364; Worcester Turnpike Corporation v. Willard, 5 Mass. Rep. 80; Gilmore v. Pope, 5 Mass. Rep. 491; Andover & Medford Turnpike Corporation v. Gould, 6 Mass. Rep. 40.

In the case before the court, these principles assume a peculiar

importance. The act incorporating the Bank of Columbia, (act of Maryland, 1793, ch. 30,) contains no express provision authorizing the corporation to make contracts. And it follows that upon principles ot the common law, it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchase, receive, enjoy, and retain, lands, tenements, hereditaments, goods, chattels, and effects, of what kind, nature, or quality, soever, and the same to sell, grant, demise, alien, or dispose of - and the board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued: to appoint and pay the various officers, and dispose of the money or credit of the bank, in the common course of banking, for the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise; it might be a serious question, how far the bank notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also, it would be a difficult question to decide, whether the law would enable a party to recover back a premium, the consideration of which had totally failed. Public policy, therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish. Indeed, the opposite doctrine, if it were yielded to, is so purely technical, that it could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical niceties, the court feel no disposition to extend their influence.

Let us now consider what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceed, on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although, then, an action might have laid against the committee personally, upon their express contract, yet as the whole benefit resulted to the corporation, it seems to the court, that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation.

In every way of considering the case, it appears to the court that there was no error in the court below, and that the judgment ought to be affirmed.

SHERMAN v. FITCH.

1867. 98 Massachusetts, 59.1

BILL IN EQUITY by assignees of the Northampton Street Sugar Refinery, an insolvent corporation, praying for a decree that a recorded mortgage of personal property, held forth by the respondent as having been made to him by the corporation, might be declared void. The mortgage (dated Jan. 19, 1865) purported, by the language of the grant, covenants, and condition, to be the mortgage of the corporation. It was signed "George R. Sampson, President of Northampton Street Sugar Refinery. [Seal.]"

After a demurrer had been overruled, the respondent filed an answer putting in issue the validity of the mortgage as a mortgage of the corporation. The case was reserved for determination by the full court on agreed facts, which were, in part, as follows:—

For some time prior to January 19, 1865, the respondent had been, and then was, selling agent of the corporation, which owed him about eighteen thousand dollars, to secure the payment of which by the corporation, George R. Sampson, who was president and a director, and was also manager of the manufacturing department, executed and delivered to him the instrument in question. At that date there were four directors (who were the principal stockholders): Sampson; his son; a nephew; and one Tappan, who was in Europe. That was the full number of the board required by the by-laws, which also provided that "the board of directors shall manage and control the business, property and affairs of the corporation." The records of the corporation contained no express vote of either directors or stockholders authorizing the execution and delivery to the respondent of a mortgage on the corporate property; but the execution and delivery of the instrument was known to all the directors except Tappan, at the time thereof, "and was approved by them, provided their neglect to make any objection to the same can be construed as an approval."

C. H. Drew, for complainants [argument omitted.]

D. P. Kimball, for respondent.

Wells, J. [The court *held*, that the mortgage was, upon its face, the mortgage of the corporation, and not the individual contract of Sampson. The court then said:]

The remaining consideration relates to the authority of Sampson to execute the mortgage in behalf of the corporation. It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation

¹ Only so much of the case is given as relates to a single point. - ED.

may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals. Emmons v. Providence Hat Manufacturing Co. 12 Mass. 237. Milledge v. Boston Iron Co. 5 Cush. 158. Lester v. Webb, 1 Allen, 34. The absence of one of the directors in Europe could not deprive the corporation of the capacity to act and bind itself by the acts of the officers in actual charge of its affairs.

ROBERTS v. P. A. DEMING WOODWORKING CO.

1892. 111 North Carolina, 432.

This was a civil action, tried at the August Term, 1892, of *Buncombe* Superior Court, before *Bynum*, J., for the value of work and labor done for the defendant corporation.

The defendant denied the debt, and resisted payment upon the further ground that the contract was not in writing under seal of the corporation, nor signed by any authorized officer thereof, and therefore void under section 683 of *The Code*.¹ When the plaintiff rested his case, the Court intimated he could not recover on his own showing; the contract, being above \$100, was not according to the formalities prescribed by *The Code*, s. 683. Whereupon the plaintiff submitted to a nonsuit and appealed.

H. B. Carter, for plaintiff.

T. H. Cobb, for defendant.

CLARK J. The court ruled that the plaintiff could not recover in any aspect of the evidence, because the contract of the defendant company was not "in writing and under the seal of the corporation, or signed by some officer of the company duly authorized," as required by The Code, s. 683. That section and its purport was construed in Curtis v. Piedmont Company, 109 Nor. Car. 401. It is there held that it applies to executory contracts and protects corporations from enforcement of such unless evidenced in the manner prescribed by the statute. But the Court adds that it does not apply to cases where the corporation has received and availed itself of property sold and actually delivered to it. In such cases, the company can be compelled to pay the fair value of such property. In the present case the claim is for work and labor done at a specified rate. The contract not being in writing and signed (or sealed), as required by the statute, the plaintiff cannot force the defendant to continue the contract as to the unexecuted part,

^{1 &}quot;Every contract of every corporation, by which a liability may be incurred by the company exceeding one hundred dollars, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto," — Code, s. 683. — Ed.

but the plaintiff is entitled to recover a fair value for the labor already performed, and which the company has accepted, and of which it has enjoyed the benefit.

The defendant contends, however, that this action is brought upon the express contract, and that no recovery can be had upon a quantum meruit, and that if this is not so, still there was no evidence to justify a verdict for the value of the services. The complaint is sufficient to warrant a recovery, either upon express contract or for the value of the work and labor done. Stokes v. Taylor, 104 Nor. Car. 394, and cases there cited; Fulps v. Mock, 108 Nor. Car. 601. No amendment was necessary, but if desirable, the Court, in accordance with the present system of procedure, which, without undue neglect of form, favors a trial upon the merits, could and should have allowed an amendment of the complaint after a verdict in favor of the plaintiff, if successful. The Code, s. 273. As to the second objection raised, the contract price agreed upon between the authorized agent of the company and the plaintiff, while not conclusive (since the express contract was perforce abandoned), was certainly some evidence sufficient to go to the jury as to the value of the services.

The nonsuit must be set aside, and the case remanded for further proceedings in accordance with this opinion.¹

PER CURIAM.

Frror.

FOSTER, J., IN ROYAL BANK OF LIVERPOOL v. GRAND JUNCTION R. & D. CO.

1868. 100 Massachusetts, page 445.

[In an action of contract on corporate bonds.] .

FOSTER, J. A sealed instrument conclusively imports a consideration. And these bonds, having been duly executed and delivered, the holders could have maintained an action upon them, if their delivery had been merely gratuitous, and no value had ever been given for them.²

¹ For a more elaborate opinion reaching substantially the same result upon a somewhat similar statute, see Pixley v. W. P. R. R. 33 Calif. 183; and compare Foulke v. R. Co. 51 Calif. 365.

² But see 1 Morawetz on Corporations, 2d ed. s. 341. — ED.

LORD CAMPBELL, C. J., IN MAYOR, &c. OF NORWICH & NORFOLK R. CO.

1855. 4 Ellis & Blackburn, p. 443 to p. 445.

[In an action against a railway company on a covenant under their seal that, unless certain works were completed within twelve months, whether an Act of Parliament then agreed to be obtained should be obtained or not, the company would pay 1000*l*. as liquidated damages.]

LORD CAMPBELL C. J. Although the agreement be under seal, we may examine to see whether there was any, and what, consideration for the contract to pay money, when we are to determine whether the contract was or was not ultra vires. The mere circumstance of a covenant by directors in the name of the Company being ultra vires, as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it. For example, if the directors of a railway company were to enter into a contract under the seal of the Company for the purchase of a large quantity of iron rails and to pay for them at a fixed price, as the vendor had reasonable ground for supposing that the rails were wanted for the purpose of the railroad, it would be no defence to an action for the price, or for not accepting them, that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles, as a speculation, and should put the seal of the Company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known to the covenantee; and, he being in pari delicto, I conceive that the maxim would apply potior est conditio possidentis. This would be an illegal contract to misapply the funds of the Company; and the illegality might be set up as a defence. So, if, without any consideration whatever, the directors of a railway company were to put the Company's seal to a deed covenanting to pay a mere stranger 1000l., this would be ultra vires, to the knowledge of the covenantee, and he could not maintain an action to recover the 1000% from the funds of the Company in fraud of the shareholders. When the excess of authority, with the knowledge of both parties, is shewn by plea, this joint violation of the law, I apprehend, is a bar to the action.

It has been contended, I am aware, that the deeds of such companies are to be treated like the deeds of individuals or of common partnerships. But there seems to be an essential distinction between them. The individual may do what he likes with his own; and he may bind himself by a deed disposing of his property, however capriciously, and without any consideration, so that no fraud has been practised upon him. In such a case, want of consideration is immaterial; no one is injured; and there is no illegality to be pleaded. "To look upon

a railway company," says Lord Langdale, in Colman v. Eastern Counties Railway Company, 10 Beav. 1, 14, "in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public, but with the private rights of all individuals in this realm. We are to look to these powers as given to them, in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public;" "and I am clearly of opinion, that the powers which are given by an Act of Parliament like that now in question, extend no farther than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned." The same learned Judge, in answer to an argument that the directors may apply the funds of the Company as they please, so that their object is to increase the traffic upon the railway, and thereby to increase the profits of the shareholders, exclaims, "surely that has no where been stated; there is no authority for saying any thing of that kind." 1 "Unless acts so done can be proved to be in conformity with the powers given by the statutes under which those Acts are done, they furnish no authority whatever."

The equity reports abound with cases in which injunctions have been granted against the application of the funds of such companies to purposes not authorized by the Acts of Parliament creating them, although professedly for the benefit of the shareholders: and I apprehend that a contract, against the performance of which an injunction would be granted in equity, must be considered illegal and void at law, on proof that, to the knowledge of both parties, it is beyond the power of the directors, and leads to a misapplication of the funds of the Company.

AMERICAN NAT. BANK v. AMERICAN WOOD PAPER CO.

1895. 19 Rhode Island, 139.2

Debt on bond. Certified from the Common Pleas Division on demurrer to the declaration.

Plaintiff sues as purchaser and bearer of certain coupon bonds, issued by the defendant corporation under its corporate seal, payable to the

¹ This citation is from the judgment as reported in 16 L. J. N. S. Chancery, 78. The passage in the judgment as reported in 10 Beav. p. 15, is to the same effect, but not in the same language.

2 Statements abridged. Part of opinion omitted. — Ed.

Girard Life Insurance, Annuity and Trust Company, or bearer, or in case of registry to the registered owner.

Richard B. Comstock & Rathbone Gardner, for plaintiff. Arnold Green & James Tillinghast, for defendant.

Stiness, J. The plaintiff sues to recover the principal and interest due on certain bonds and coupons issued by the defendant May 1, A. D. 1890, and payable May 1, 1900, or sooner after five years. The bonds are secured by a mortgage of all the defendant's property, in the State of Pennsylvania, given to a trustee for the bondholders, in which it is provided that in case of default in the payment of interest for more than six months, the principal of said bonds shall be due and payable. The declaration sets out the bonds and mortgage, profert of which is made, and alleges default in payment of interest for more than six months after demand made therefor. The defendant demurs to the declaration, upon several grounds; but the two grounds pressed in the argument are that the bonds are not negotiable so as to give the plaintiff a right of action in its own name, and that the terms of the mortgage cannot be imported into the bonds so as to give a right of action for the principal thereof before maturity.

We think that the bonds must be treated as negotiable securities. While there has been some diversity of opinion upon this subject, the tendency of recent decisions and the weight of authority and reason seem now to be in favor of negotiability. At first, before such bonds had become common, courts naturally held that they lacked the technical and established characteristics of negotiable instruments. Thus, in Crouch v. The Credit Foncier, L. R. 8 Q. B. 374 (1873), it was held that the contract embodied in similar bonds prevented them from being promissory notes, even if they had been without a seal, and that the custom to treat them as negotiable, being of recent origin, could not attach as incident to a contract contrary to the general law. But in Goodwin v. Robarts, L. R. 10 Exch. 337 (1875), the court, by Cockburn, C. J., does not concur in thinking the latter ground conclusive. In the recent case Venables v. Baring, L. R. 3 Ch. Div. 527 (1892), American railroad bonds, upon the evidence of an American lawyer as to their negotiability in this country, were held to have acquired in England, in the city of London, among English merchants, the character of negotiability. Notwithstanding the limitations of this decision we think it may be taken as practically settling the rule in England. See also In re Imperial Land Co., L. R. 11 Eq. Cas. 478. In this country the decisions have been quite explicit. The principle on which they rest was well stated by Mr. Justice Grier, in Mercer County v. *Hacket*, 1 Wall. 83 (1863), as follows:

"This species of bonds is a modern invention, intended to pass by manual delivery and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by States and corporations they are necessarily under seal. But there is nothing ammoral or contrary to good policy in making them negotiable, if the

necessity of commerce require that they should be so. A mere tech nical dogma of the courts of common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a cor-1 poration covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world and have received the sanctions of judicial recognition, not only in this court (White v. Vermont R. R., 21 How. 575), but of nearly every State in the Union, is well known and admitted."

After this strong statement it is needless to say more, except to refer to a few cases to the same effect. Kneeland v. Lawrence, 140 U.S. 209; Chicago Railway Co. v. Merchants' Bank, 136 U. S. 268; DeHass v. Roberts, 59 Fed. Rep. 853; Reid v. Bank of Mobile, 70 Ala. 199; National Exchange Bank v. Hartford, Prov. & Fishkilk R. R. Co., 8 R. I. 375; 1 Randolph on Commercial Paper, § 74, note 1, and cases cited. It is true that some States have statutes which declare bonds of this kind to be negotiable, (see 2 Amer. & Eng. Ency. of Law, 319), and the point is taken that it is not so in this State, since Pub. Stat. R. I. cap. 142, §§ 6, 7, relate only to promissory notes. We do not think, however, that this fact prevents us from holding these bonds to be negotiable. Such statutes are declaratory and remedial and are evidently not intended to exclude other forms of negotiable paper. Bonds of this sort are clearly within the intent of the statute to give a title by delivery and a right of action to the holder of negotiable paper, and the bonds in effect are promissory notes. The special provisions contained therein are not such as to deprive them of their fundamental character of a promise to pay at a certain time. These bonds are not given as collateral to a note secured by mortgage, but the mortgage is security for the bonds themselves. Riker v. Sprague Manuf. Co., 14 R. I. 402. See Costello v. Crowell, 127 Mass. 293, and 134 Mass. 280.

[Omitting opinion on remaining point.]

Our conclusion is that the demurrer to the negotiability of the bonds must be overruled, and the demurrer to the statements of the plaintiff's present right of action must be sustained.

MORRISON v. WILDER GAS CO.

1898. 91 Maine, 492.1

WISWELL, J. This action is to recover the purchase price of certain materials furnished by the plaintiffs for the construction of a gas plant at Rockland. The defendant denied that it had ordered the goods, or received them, or that it had any connection whatever with the construction of the gas plant.

For the purpose of showing that the defendant did construct this plant, and that it received and used these articles in the construction, the plaintiffs were allowed to introduce in evidence, against the defendant's objection, a written instrument which purported to be executed by the defendant corporation and which provided for the construction of the plant. The attestation clause and form of execution were as follows:—"In witness whereof, said Wilder Gas Company by the hands of its chairman of the executive committee, Luke A. Wilder, thereunto duly authorized, has hereunto set its corporate name and affixed its corporate seal, and said Knox Gas and Electric Company by the hand of A. D. Bird, its Treasurer, thereunto duly authorized, has set its corporate name and affixed its corporate seal the year and day above written.

The Wilder Gas Co., by Luke A. Wilder,

Chairman of Executive Committee (L. S.) Knox Gas & Elec. Co., by A. D. Bird, Treas. (L. S.)"

Objection was made to the introduction of this instrument upon two grounds: because it was not a contract between the parties to the suit, and because there was no evidence showing that the contract had been authorized by the defendant corporation. We have no doubt that a contract between the defendant and the owner of the plant, if shown by competent testimony to have been authorized by the defendant, was admissible in evidence for the purpose for which it was introduced.

But was there any evidence showing that this instrument was the contract of the defendant? The signature of Luke A. Wilder, and the fact that at the time he was a member of the board of directors and of the executive committee of the defendant corporation, were proved and admitted; but there was no evidence by record or otherwise, outside of the instrument itself, and the fact that it bore the corporate seal, that the contract was ever authorized by the corporation, or that Wilder had authority to execute this contract or contracts of this general description, or that the executive committee or any member thereof had any authority to make contracts of this nature.

Some cases and text writers have laid down the rule that the presence of the corporate seal upon an instrument that purports to be the contract of a corporation gives rise to a prima facie presumption that it was affixed by proper authority; while others very materially limit

¹ Statement and arguments omitted. - Ep.

the rule by saying, that when the seal is affixed by a proper official, in the line of his authority, it is evidence of the assent and act of the corporation.

Here the only proof was that Wilder was a director and member of the executive committee. But a director, as such, has no authority to make contracts for his corporation. He may of course have such authority,—it may be either express or implied, and it may be shown by record or parol,—but it does not follow that he had, merely from the fact of his being a director. It is a familiar rule, which requires no citation of authority, that directors of a corporation, as such, have no implied authority to act singly; they can only act as a board, unless there be an express or implied delegation of authority to act individually. So far as this case shows, Wilder had no such authority; he was not the proper official, either to sign the corporate name or to affix the corporate seal; it was not within the line of his authority.

We can see no reason why the presence of a corporate seal, which does not appear to have been affixed by one having authority, or by a proper official in the general line of his authority, should be even prima facie evidence that a contract, signed and sealed by a person, who, so far as the case shows, had no authority to make or execute

this or such a contract, was the contract of the corporation.

We very much prefer the doctrine laid down by Mr. Morawetz in his work on Private Corporations. We quote from that work a portion of section 340: "It has sometimes been said, that, if the seal of a corporation appears to be affixed to an instrument, the presumption is that it was rightfully affixed, - that the seal is itself prima facie evidence that it was affixed by the proper authority. The meaning of these statements is not perfectly clear. The seal of a corporation certainly has no mysterious virtue not possessed by other seals; and a contract under seal executed by the agents of a corporation is subject to the same rules of evidence, and of law, as a similar contract executed by the agents of an individual. In order to prove the execution of a contract purporting to have been executed under the corporate seal, two facts must be shown. First, it must be shown that the agents by whom the contract purports to have been executed were in fact agents of the corporation, having authority to execute the contract in question, or contracts of that general description; and, secondly, it must be shown that the signatures are genuine, or, in other words, that these agents did actually execute that particular contract. The mere circumstance that a seal was affixed to the contract would evidently not tend to establish either one of these facts."

Here there was sufficient evidence that Wilder executed the contract in the name of the corporation and affixed thereto the corporate seal. There was no evidence whatever that he had any authority, express or implied, to execute this contract, or contracts of this nature, or any contract whatsoever for the defendant corporation. We think

therefore, that the instrument was improperly admitted.

 ${\it Exceptions. sustained.}$

CHAPTER X.

DIRECTORS.

SECTION I.

Powers of Directors.

GASHWILER v. WILLIS.

1867. 33 California, 11.1

Action for false representation. The defendants were stockholders in a California corporation, The Rawhide Ranch Gold and Silver Mining Company. Plaintiffs averred that they were induced to purchase, on October 2, 1865, the company's mine; and that this purchase was induced by the false representations of defendants as to the terms of a trust deed which had been executed by the corporation to Barney, June 5, 1865, and under which other parties had a better title than plaintiffs acquired by their subsequent purchase in October.

On April 29, 1865, at a stockholders' meeting, at which all the stockholders were present, a resolution was unanimously adopted authorizing Turner, Willis, and Hodges, Trustees of the corporation, for and on behalf of the corporation, to sell and convey the mine to Barney. In pursuance of said resolution, and without any other authority shown, a conveyance was executed to Barney, on June 5, by said Trustees, purporting to be the deed of the corporation. The deed was signed by the Trustees, for and on behalf of the corporation; the Trustees affixing their own seals, "the said corporation having no seal."

On the trial, after proving the adoption of the resolution, plaintiffs offered in evidence the said deed of June 5, which was excluded by the court. To this exclusion, the plaintiffs excepted, and the case came up on appeal.

H. P. Barber, and James H. Hardy, for Appellants.

John B. Hall, and Caleb Dorsey, for Respondents.

SAWYER, J. . . .

Under the view we take, it will only be necessary to consider the

1 Statement abridged. Argument and parts of opinion omitted. - Ep.

first ground of the objection, and the question is, does the instrument in question appear to be the act or deed of the corporation?

We are not aware of anything in the law, independent of any authority expressly conferred by the corporation, which authorizes Turner, Willis and Hodges, in their official character as Trustees, to execute the instrument in question on behalf of the corporation. No law of the kind has been called to our attention, and we do not understand that any is claimed by appellants' counsel to exist. And there is nothing in the nature of those offices, as connected with the object and business of the company, from which a general power in the Trustees, when not acting as a Board, to sell and convey the mine, mill and other property of the company, could be implied. (McCullough v. Moss, 5 Den. 575.) The parties executing the instrument, then, if they had any authority in the premises, must have derived it from some corporate act; and the only act proved or relied on is the resolution adopted at the stockholders' meeting before mentioned. This was a meeting of the stockholders only. It was called as such, and the proceedings all appear to have been conducted as a stockholders' meeting. The resolution authorizing the sale and conveyance of the mine, etc., in question, was adopted by the stockholders, as such, at said meeting, and not by the Board of Trustees, or at any meeting of said Board. The Board of Trustees do not appear to have ever acted at all upon the matter in the character of a Board, but the testimony shows that they acted in pursuance of the said resolution adopted at the meeting of stockholders.

Section five of the Act authorizing the formation of corporations for mining purpose's provides: "That the corporate powers of the corporation shall be exercised by a Board of not less than three Trustees, who shall be stockholders," etc. And section seven provides that: "A majority of the whole number of Trustees shall form a Board for the transaction of business, and every decision of a majority of the persons duly assembled as a Board shall be valid as a corporate act." (Laws 1853, p. 88, Sec. 5; 7 Hittell's Gen. Laws, Arts. 936, 938.) Conferring authority to sell and convey the corporate property is the exercise of a corporate power, and under these provisions the "corporate powers of the corporation" are to be exercised by the Board of Trustees when the majority are "duly assembled as a Board." When thus assembled and acting the decision of the majority "shall be valid as a corporate act." We find nothing in the Act authorizing the stockholders, either individually or collectively in a stockholders' meeting, to perform corporate acts of the character in question. The property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not in their individual capacities owners of the property as tenants in common, joint tenants, copartners or otherwise. (Gorham v. Gilson, 28 Cal. 484; Mickles v.

Rochester City Bank, 11 Paige, 128.) This proposition is so plain that no citation of authorities is needed. Had the stockholders all executed a deed to the property, they could have conveyed no title, for the reason that it was not in them (Wheelock v. Moulton et al., 15 Vt. 521); and what they could not do themselves they could not by resolution or otherwise authorize another to do for them. The corporation could only act - could only speak - through the medium prescribed by law, and that is its Board of Trustees. As well might the citizens of San Francisco in public meeting assembled, by unanimous resolution authorize certain Supervisors, designated by name, to sell and convey the City Hall. It is said, however, that the Trustees were also all present and participated in the proceedings at the stockholders' meeting and assented to the resolution; that the resolution therefore was approved by all of the constituents of the corporation, and the powers of the corporation were exhaustively exercised. But they were acting in their individual characters as stockholders, and not as a Board of Trustees. In this character they were not authorized to perform a corporate act of the kind in question. As well, also, might a valid ordinance be passed by the citizens of San Francisco in public meeting assembled, at which the Supervisors were all present and voted in the affirmative. Such an ordinance, when signed by the Mayor, would have the assent of all the constituents of the corporation as clearly as the resolution in question has in the present instance. But such is not the mode in which the corporation is authorized by the law of its creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the Trustees when assembled and acting as a Board. This is the mode prescribed. As a Board they could perform valid corporate acts, and confer authority within the province of their powers, upon the Trustees individually or upon any other parties to perform acts as the agents of the corporation. We are not without authorities upon this precise point.

In Conro v. Port Henry Iron Company, 12 Barb. 27, the same question arose. A lease of the company's iron works was made in pursuance of a resolution adopted at a meeting of the stockholders at which the Directors were present. It was held that the resolution imparted no authority to make the lease. The Court say: "The stockholders in this case had no power to make a lease or do any other administrative act in the management of the affairs of the corporation. If a lease could be made at all, it could be executed only in pursuance of the act of the Directors, who are the body appointed by the charter for the management of its affairs. It is no answer that the individual stockholders, who were present at the meeting when the lease was ordered, were also Directors. They did not meet as Directors, but as stockholders. The Mayor and Common Council of a municipal corporation can only act in the manner prescribed by law. When not acting in their official character and in the mode prescribed by law,

their acts are no more binding than those of other private citizens. (See, per Lord Mansfield, Rex v. Head, 4 Burr. 2,515, 2,521.)" (Ib. 63.)

[After commenting on various cases.] These cases are in point, and none to the contrary have been called to our attention. They are the necessary consequence of the principles established by the great body of the authorities, that the corporate powers of corporations can only be exercised in the mode and through the instrumentalities prescribed by their charters. In this case, the resolution adopted by the stockholders was not a corporate act, and it conferred on the three Trustees named - whether they constituted the whole number of Trustees does not appear - no authority to perform a corporate act, to execute the deed, or adopt a seal for the occasion. It not only does not appear, then, that the instrument in question is the act or deed of the corporation, but it affirmatively appears that it was executed in pursuance of a resolution that conferred no authority whatever to perform a corporate act; for the plaintiffs themselves introduced in evidence the authority under which they claimed the act to have been performed, and upon which they relied. Having done this, we are not at liberty to indulge the presumption that the parties executing the deed on behalf of the corporation were otherwise duly authorized. The authority acted upon is affirmatively shown, and this fails. We think the deed properly excluded. But even if it had been admitted without further proof of the authority of the parties to execute it, it would not have availed the plaintiffs. As there does not appear to have been any authority in the parties assuming to act, to sell or convey at all, it is unnecessary to discuss the other questions.

Judgment affirmed.

Mr. Justice Rhodes did not express an opinion.

By the Court, SAWYER, J., on petition for rehearing:

'The consequences assumed as the only basis of the argument in the petition for rehearing do not follow from anything determined or in any way suggested in the opinion in this case. We have nowhere held, or even intimated, that the Board of Trustees of a corporation can convey all the property of the corporation necessary to enable it to carry on the business for which it was organized, or do anything else destructive of the objects of its creation without the consent of its stockholders. We have not even held that it was competent for the Trustees, acting as a Board, to authorize the conveyance of the property now in question without the consent of the stockholders. There was no such question in the case. We simply held that the stockholders themselves could not authorize the Trustees, acting as individual Trustees, or anybody else, to convey it - that nobody could convey it unless authorized by some act of the Board of Trustees, acting as a Board. It may be conceded for the purposes of this case that the Board of Trustees itself could not authorize a conveyance of the property in question without the consent of the stock-holders. But it is unnecessary to consider that question, for the case does not present or even suggest it. It will be time enough to decide that question when it arises.

Rehearing denied.

GREEN, V. C., IN ELLERMAN v. CHICAGO JUNCTION R. CO.

1891. 49 New Jersey Equity, 219, pp. 231-233.

GREEN, VICE-CHANCELLOR. The bill is filed by a stockholder in behalf of himself and any other applying stockholders against the corporation to prevent its carrying a contract, made by the directors, into execution, on the ground that the same is not legally within the powers conferred by its charter. No question is raised as to the validity of the organization, or the legality of the purposes stated in the certificate of incorporation as not contemplated by the Corporation act, if, indeed, such questions could be raised by a private person in this court. National Docks Co. v. Central R. R. Co., 5 Stew. Eq. 755; Elizabethtown Gas Light Co. v. Green, 1 Dick. Ch. Rep. 118. He appeals not through or by the attorney-general, but bases his claim for relief solely upon his ownership of certain shares of the stock of the Junction Company. The theory of the suit is, that the agreement will be an injury, primarily, to the company and, incidentally, to him as a stockholder; that appeal to the present directors to protect the company and stockholders will be futile, as they have decided otherwise, and, therefore, he asks to be permitted to act for himself and others in like position. The only damages with which complainant, as a stockholder, can be threatened are to the security of his investment, and to the dividends he expects to receive - whether the latter is imminent depends mainly upon the probable results of the arrangement challenged, as a business operation. As a holder of preferred stock, his fixed yearly dividend is secured by the articles of incorporation, while the dividend on his common stock must depend on the success of the business and the action of the directors, for such dividends may be lawfully diminished if the diversion of the same be for a purpose which is within the corporate powers, unless the non-declaration of them be in fraud of the rights of the stockholders. Beach Corp. p. 601. Nor is his right to challenge action which he may deem dangerous to his investment absolute. Individual stockholders cannot question, in judicial proceedings, the corporate acts of directors, if the same are within the powers of the corporation, and, in furtherance of its purposes, are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment. Questions of policy of management, of expediency of contracts or action, of

adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation. Park v. Grant Locomotive Works, 13 Stew. Eq. 114; affirmed, 18 Stew. Eq. 244; Elkins v. Camden and Atlantic R. R. Co., 9 Stew. Eq. 241; Rutland and B. R. Co. v. Proctor, 29 Vt. 93; Morawetz Corp. § 243; Beach Corp. p. 388.

By the Corporation act (*Rev. p.* 177 \S 1 \P 6) power is given to corporations to make by-laws for the regulation and government of its affairs.

By the by-laws of the Junction Company, article 2, section 1, it is provided that the business of the company shall be managed and conducted by a board of ten directors.

The bill alleges that the board of directors of the Junction Company did, by a resolution, order and direct the execution of the contract in question, and the answer of the company states that each and every director of the company has voted in favor of the agreement as being for the best interests of the company.

The agreement, then, has the unanimous sanction of the board of directors, to whose judgment and determination the management and control of the affairs of the company has been entrusted without restriction.

[The court held, that the covenants entered into by the company in this contract "are referable to the objects stated in their certificate of incorporation or to powers incident to the corporation, and are authorized by its charter."]

HOYT v. THOMPSON'S EXECUTOR.

1859. 19 New York, 207.1

Comstock, J. . . . The precise point in controversy is, whether the plaintiff or one Abraham G. Thompson became entitled to a bond and mortgage of \$60,000, executed in November, 1839, by the Long Island Railroad Company, a corporation chartered by this State, to the Morris Canal and Banking Company. The last mentioned company was a New Jersey corporation, and held and owned this security until December 9, 1840, when an assignment of it was made to the State of Michigan. Thompson claimed title and acquired possession of the security under this transfer, having purchased it at auction from the agent of Michigan, in May, 1843. The plaintiff claims under a transfer, junior in point of time, made to one Sanxay his immediate as-

signor, by the receivers of the Morris Canal and Banking Company, on the 13th of November, 1845. Those receivers were appointed in January, 1842, by the Court of Chancery of the State of New Jersey, in a suit instituted against the company in August, 1841, by Richards and Selden, who were its judgment creditors. If the plaintiff can impeach the prior transfer to the State of Michigan and the title which the plaintiff derived from that State, no doubt exists in regard to the validity of his own title. The validity of that assignment to Michigan is denied by the plaintiff on two grounds: First, that it was made by the executive officers of the company without the authority of the board of directors, in other words, that it was not the act of the corporation, and for that reason was utterly void. Second, on the ground that it was voidable as to creditors, under an act of the Legislature of New Jersey, passed February 16, 1829, "To prevent frauds by incorporated companies." These two grounds of objection have no dependence on each other, and they will, therefore, be separately considered.

First. The Morris Canal and Banking Company was authorized by its charter, granted in 1824, to construct a canal in the State of New Jersey, and also to carry on the business of banking; to buy and sell bills of exchange; to deal in public and corporate stocks; to loan money on bond and mortgage; to receive money or property in trust and to execute trusts. Its capital stock, for the purpose of building the canal, was fixed at \$1,000,000, and \$1,000,000 more could be added for the purposes of banking. The number of directors, originally fifteen, was increased by a supplementary act to twenty-three, and it was declared that "the corporate powers of the company should be exercised by the board." Authority was given to establish such bylaws, ordinances and regulations as should be deemed necessary or convenient for the transaction of its business. A code of by-laws was adopted, one of which provided for stated meetings of the directors. in each week, and declared that five directors, including the president, should form a quorum for the transaction of the ordinary business of the company. In the intervals between the stated meetings of the directors, the business and affairs of the company were to be managed by the standing and special committees, which were to report their proceedings for the approbation of the board. The same by-laws set forth certain acts which could not be done without the concurrence of a majority of all the directors, such as the election of officers and the filling of vacancies in the board.

We come now to the transaction between the company and the State of Michigan, examining, in this connection, only the question whether the transfer to that State of the bond and mortgage in controversy is to be regarded as made by the authority of the corporation. In the course of its dealings the company became largely indebted to Michigan, and in the year 1840, the State was pressing for payment; the amount due then being about \$800,000. The negotiations, which were carried on for a considerable time, resulted in an agreement,

dated December 9, 1840, professing to be between the company of the one part, and the State of Michigan of the other, whereby certain securities held by the company were to be delivered over to the State, and the debt was to be paid by installments, extending through a period of some ten or twelve years. The State, on its part, agreed to receive the debt in those installments, and to extend the time accordingly, provided the payments were made pursuant to the stipulation. The securities mentioned in the agreement consisted of various bonds. mortgages, stocks and bills receivable, amounting nominally to between \$500,000 and \$600,000; and among them was the bond and mortgage of the Long Island Railroad Company, which is the subject of the present controversy. The agreement was under the corporate seal of the company, and was signed on its behalf by its president and cashier. It was carried into effect by an actual transfer and delivery of the securities specified. On the part of the plaintiff it is insisted that the agreement and transfer were wholly inoperative and void, on the ground that they were never formally authorized by the board of directors. It appears, however, from the recorded proceedings of the board, that at a meeting held on the 5th of November, 1840, there being present a quorum of five members, in accordance with the by-law above mentioned, the negotiations with Michigan were mentioned by the president as being nearly completed; and it also appears that at a meeting held on the 31st of December, 1840, the same quorum being present, including the president, a formal resolution was adopted, approving of the said agreement entered into on the 9th of the same month, and directing the executive officers of the company to comply, in all respects, with the provisions thereof. The company, at the time of this transaction, was embarrassed in its affairs, but it kept its office open and continued to transact business until September, 1841, when it went into open insolvency. During the period of its existence remaining after these arrangements were made with Michigan, no objection thereto appears to have been made on the part of the company. On the contrary, there seems to have been entire acquiescence, and the company received the advantages resulting from an extension of a very large debt, which had been pressed with great earnestness, and which it had no present means of paying.

The first inquiry suggested by the facts stated is, whether the bylaw of the company authorizing a quorum of five directors, including the president, to transact ordinary business, was a valid negotiation. We are clearly of opinion that it was. The charter of the company, it is true, declared that its powers should be exercised by a board of twenty-three directors, and it may well be conceded that in the absence of any different regulation, a majority of the whole number would be necessary to constitute a legal quorum for the transaction of any business whatever. But it would be a very extraordinary construction of the charter in this respect, to hold that the board of twentythree directors, or a majority thereof, must meet and act whenever any corporate power was to be exercised, and that no delegation of authority could be made to subordinate agents, to committees, or to a quorum consisting of a smaller number. The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former, and if the power of substitution is not conferred in the appointment, it cannot exist at all. But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the State in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. Without it the most ordinary business could not be carried on, and the corporate powers could not be executed. It is upon this principle, not less than upon the express power contained in the charter to enact by-laws, that the by-law in question, adopted by the Morris Canal and Banking Company, rests. It was, in substance and effect, a regulation which constituted a subordinate agency to conduct the ordinary business of the corporation. The persons composing the agency would change according as the quorum of five or more directors attending the meetings might be constituted of different individuals. But if the board could delegate the power of transacting business to five or more individuals named, no doubt exists that the same authority might be imparted to a shifting quorum, composed of the same number.

In the next place, were the arrangements made with the State of Michigan, "ordinary business," within the meaning of the by-law? The ordinary business of the corporation had, I think, no limit short of the varied and extensive affairs in which it was authorized by its charter to engage. It could construct and operate a canal, deal in stocks and in trusts, and it could carry on the business of banking in all its departments. If the due execution of these powers did not constitute the ordinary business of the company, then it seems to me impossible to suggest any definition of those terms, and the by-law becomes senseless and unmeaning; and if these express powers of the corporation were embraced in the terms of the by-law, it must necessarily follow that the quorum designated took all the incidental authority which the whole board would possess in the execution of the same powers. In the operations of banking, which constituted one portion of the ordinary business, it might become necessary to borrow money and the power to do so existed. (Curtis v. Leavitt, 15 N. Y. 9.) As debts could be created, the incidental power of paying them

cannot be doubted. So the condition of the company's affairs might require a negotiation with creditors and the postponement and securing of their demands. To secure a debt and procure its forbearance in a period of embarrassment would not, by any means, be an extraordinary act, in the sense of the by-law, although it might be very unusual in the magnitude and importance of the transaction. In the case before us, if the debt due to the State of Michigan had been much smaller in amount, and the company had pledged only an inconsiderable portion of their assets to secure its payment at a future day, in order to avoid the inconvenience of a present liquidation, no one would claim that such a transaction was extraordinary. But can the validity of such an act depend on the inquiry whether the debt and the security pledged were a small or a large debt and security? If so, then at what sum or value would the transaction cease to belong to the ordinary business of the corporation, and become extraordinary, so as to exclude the authority of the quorum constituted by the bylaw? If this question cannot be answered, as plainly it cannot be, the conclusion would seem to follow that the mere magnitude of the arrangements with Michigan furnish no ground for impeaching their validity. In adopting this conclusion, it is assumed that those arrangements were entered into, not for the purpose of arresting the business of the corporation, but as a means of avoiding present embarrassments, and with the design of facilitating the further and continued prosecution of its ordinary business. That such were the motives which prompted the negotiation seems to have been found as a conclusion of fact by the court from which the present appeal is taken, and the evidence certainly tends to that result.

As already stated, the transfer of securities, including the one in question to Michigan, was made with the previous knowledge of the quorum of directors constituted by the by-law, and the same quorum subsequently, by a formal resolution, expressly ratified and approved the transaction. Upon that authority, therefore, the transfer rested; and for the reasons which have been given, we think the authority was sufficient.

[Remainder of opinion omitted.]

SHAW, C. J., IN BURRILL v. NAHANT BANK.

1840. 2 Metcalf (Massachusetts), 163, pp. 166, 167.

SHAW, C. J. . . . It was contended that a board of bank directors, exercising themselves a delegated authority, have no power to delegate an authority to any committee to alienate or mortgage real estate, and that if the authority of the committee was to convey, they had no power to mortgage. To both parts of this objection we think

there is an answer. In the first place, we think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors of the banks of Massachusetts is a body recognized by law. By the by-laws of these corporations, and by a usage, so general and uniform as to be regarded as part of the law of the land they have the general superintendence and active manage ment of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation? We think they do not exercise a delegated authority, in the sense in which the rule applies to agents and attorneys, who exercise the powers especially conferred on them and no others. We think, therefore, that a board of directors may delegate an authority to a committee of their own number, to alienate or mortgage real estate; that an authority to convey necessarily implies an authority to execute suitable and proper instruments for that purpose; and, in case of a corporation, to affix the corporate seal to an instrument requiring it.1

BLACK, J., IN HUTCHINSON v. GREEN.

1886. 91 Missouri, 367, pp. 375, 376.

BLACK, J. . . . It is further insisted that the board of directors had no power to make the assignment without the consent of the stockholders. A corporation may, like an individual, make an assignment under the statute of this state relating to voluntary assignments. Shockley v. Fisher, 75 Mo. 498. By whom, then, is the power to be exercised? By the directors, the stockholders, or by both? Where the powers of a corporation are vested in a board of directors, they may, unless restricted, do whatever the corporation might. Field on Corp., secs. 146 and 152. Now, while, by express statute, a vote of the stockholders of these corporations is essential to enable them to increase or diminish the stock, to change the business, to issue preferred stock, and to convert bonds into stocks, still, in general, article 8, of chapter 21, Revised Statutes, contemplates that the business will be conducted by a board of directors. Section 930, among other things, provides that "the property or business of the corporation shall be conducted and managed by directors." Certain it is there is nothing in the statute under which this corporation was created, and by which it is governed, or in its articles of association, or bylaws, which limits or restricts the powers of the directors in the disposition of the property. The corporation then has the power to make an assignment,

¹ Under a Massachusetts statute of subsequent date, no conveyance or mortgage of the real estate of a corporation, or lease thereof for more than one year, shall be made "unless authorized by a vote of the stockholders at a meeting called for the purpose." Pub. Sts. ch. 106, s. 23. — Ed.

and that power being vested in the directors without restriction, it must follow that they, and they alone, are authorized to make it. It is the duty of the directors to care for the creditors, and when the corporation becomes crippled and unable to meet its obligations in the usual course of business, it is competent for the directors to make an assignment, and this they may do without the consent of the stockholders. This conclusion has the support of adjudications of this and other courts. Chew v. Ellingwood, 86 Mo. 260; Dana v. The Bank of the United States, 5 W. & S. (Pa.) 223; DeCamp v. Alward, 52 Ind. 473. The directors may, with propriety, consult with the stockholders, but under the circumstances just stated, and in the exercise of their best judgment, they may make the assignment even against the expressed will of the stockholders. Of the cases relied upon by the appellants, that of Abbott v. American Hard Rubber Co., 33 Barb. 580, was not an assignment for the benefit of creditors. There the trustees attempted, through the form of a sale, to secure to themselves the property of the corporation at the expense of the other stockholders. The sale was voidable, as to the stockholders not consenting, though a majority agreed to the transaction.

CHICAGO CITY RAILWAY COMPANY v. ALLERTON.

1873. 18 Wallace (U.S.), 233.

APPEAL from the Circuit Court for the northern district of Illinois; the case being thus:

The Chicago City Railway Company was a corporation owning a street railroad in Chicago. The directors of the company, without consulting the stockholders or calling a meeting of them, resolved to increase the capital stock of the company from \$1,250,000 to \$1,500,000. To this one Allerton, who was a stockholder, objected, and filed a bill praying for an injunction to prevent the increase. His position was that it could not be lawfully made without the concurrence of the stockholders, and in support of this view he relied upon the constitution of Illinois, adopted in July, 1870, by the thirteenth section of the eleventh article of which it is declared as follows:—

"No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock-dividends, and other fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days' public notice in such manner as may be provided by law."

He also relied on an act of the legislature of Illinois, passed March 26th, 1872, to execute and carry out the above provision of the consti-

tution, by which, amongst other things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations, without a vote of two-thirds of the stock at a stockholders' meeting.

The railway company, in its answer, relied upon its charter, granted February 14th, 1859, the third and fourth sections of which were as follows:

"Section 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation.

"Section 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horse-power. The court decreed in favor of the complainant and the company took the present appeal.

Mr. Charles Hitchcock, for the appellant; Mr. D. A. Storrs, contra. Mr. Justice Bradley delivered the opinion of the court.

Without attempting to decide the constitutional question, or to give a construction to the act of the legislature, we are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association.

Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their char-

acter, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders, would be to make them members of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder pro rata, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concern.

These conclusions flow naturally from the character of such associations. Of course, the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made, would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

Decree affirmed.

SECTION II.

Duty of Care due from the Directors to the Corporation.

SPERING'S APPEAL.

1872: 71 Pa. State, 11.2

Sharswood, J.—This bill was filed by the appellant as the assignee of the "National Safety Insurance and Trust Company," against the defendants, who were directors of the corporation, alleging fraudulent, illegal and improper management of its affairs, extending over a period of more than ten years, from 1850 to 1861. The case upon the bill, answers and proofs was referred to a Master, who reported that the bill should be dismissed and a pro forma decree was entered accordingly.

Upon a careful examination of the record and paper-books, which make up nine hundred and sixty-six printed octavo pages, we have come to the following conclusions of fact, which are supported also by the opinion of the Master. First, That no fraudulent conduct is imputable to any one of the defendants, at any period of time during their administration of the trust. No pecuniary advantage, to the amount of a dollar, was ever realized or sought by any one of them. There was no embezzlement or misappropriation of the funds by any officer or agent of the corporation. There is no pretence that the defendants are liable to account upon either of these grounds. "One fact," says the Master, "is quite clear - that none of the defendants have made any profit out of their transactions which was not common to all the stockholders." Second, That in regard to investments, and the mode of transacting the business - the legality of which under the charter is questioned - the defendants uniformly acted under legal advice. "It appears in the evidence," says the report, "that the defendants always acted upon legal advice, as to the mode of doing business and making investments. No important step was ever taken without first obtaining the advice of the solicitor." Third, Looking at the history of the institution in the light of subsequent events, its direction was unwise and unfortunate. The money of the depositors was not invested in first-rate and perfectly safe securities, as they engaged to do, and as the funds of such a charity unquestionably ought to be. Loans were largely made upon very doubt-

¹ See later chapters for cases as to the right of stockholders or creditors to maintain suits, in their own names, against directors for alleged mismanagement.

Important questions have arisen as to the construction and operation of statutes which impose liabilities upon directors. But the statutory liability of directors is not one of the topics specifically dealt with in this work. — Ep.

² Statement omitted. — Ep.

ful collaterals. Their investments in real estate were injudicious. They lost from a failure to insure. They sought to realize large profits at usurious rates of interest. The crash came in 1860, just before the breaking out of the civil war. All doubtful securities fell in the market. Their debtors went to the wall. In the vain attempt to sustain their credit they sacrificed securities and collaterals. Had they stopped and made an assignment at once, a large amount of the loss which subsequently fell upon them would undoubtedly have been prevented. The story might be much amplified by entering into a detail of particulars: but the conclusion would be the same. Such is a brief résumé of the facts. It is not the history of this institution alone, but of many others in this country.

The broad question then is, whether upon such a state of facts, the directors of a corporation can be made to account for losses arising from mismanagement merely.

It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that as I apprehend is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandatories - persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more. Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill. Ought they to. be held responsible for mistakes of judgment or want of skill and) knowledge? They have been requested by their co-stockholders to take their positions, and they have given their services without compensation. We are dealing now with their responsibility to stockholders, not to outside parties - creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many dicta not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that there might not exist such a case of negligence or of acts clearly ultra vires, as would make perfectly honest directors personally liable. But it is evident that gentlemen elected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were

such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places. The authorities I think fully endorse these views.

The leading case is The Charitable Corporation v. Sutton, 2 Atk. 400, which was treated by Lord Hardwicke as a case of fraud entirely. Five of the managers or committee-men entered into a confederacy to loan out money to their own storekeeper, upon whom was devolved the duty of putting an estimate upon the value of the pledges; the others connived at the fraud. "It is such a notorious fraud or at least gross inattention," said the Lord Chancellor, "to suffer him, who was to set a value on all the pledges, to borrow money upon them himself, that I shall direct those who appear to be guilty of it to make good the loss. Committee-men are most properly agents to those who employ them in the trust and who empower them to direct and superintend the affairs of the corporation. If some persons are guilty of gross non-attendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others." So accordingly in The York and North Midland Railway Company v. Hudson, 16 Beavan 495, the chairman of a railway company appropriated unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, but which it was insinuated was in the nature of "secret service money;" it was held that if the defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences, and that being charged with the receipt of the money, he could not discharge himself by the suggestion of such an application. In Williams v. Page, 24 Beavan 661, Sir John Romilly said, in treating a director as a trustee: "The trust no doubt is a peculiar one." In Great Luxembourg Railway Co. v. Magnay, 25 Beavan 592, he held that if a director enters into a contract for the company he cannot personally derive any benefit from it. So also in Ex parte Bennett, 18 Beavan 339, directors of a public company are trustees for the shareholders, and their private interests must yield to their public duty wherever they are conflicting. In Turquard v. Marshall, 3 Equity (Law Rep.) 127, which is the last English case on the subject. Lord Romilly, M. R., held directors liable, first, for not calling a meeting of the shareholders under a clause of the charter requiring them to do so, on the exhaustion of their surplus fund, and second, for loaning money to one of themselves without security. He used however this language: that if directors have been guilty of gross and palpable breach of trust, which cannot be set right by a public meeting of the company, they may be made responsible for their misconduct. On appeal, however, the decree of Lord Romilly, holding the directors personally liable, was reversed by Lord Chancellor Hatherley, 4 Chancery Appeals (Law Rep.) 386. He said: "There was no fraud alleged, nor was it alleged that the directors applied the

funds of the company to their own use, or in any way except in what they thought was for the benefit of the company, however incorrect their course might have been." Then as to the loan to Higgins (the co-director): "The statement of this in the bill was only as part of the general misconduct of the directors, and the loan was only mentioned as one of the losses incurred. There was no specific allegation of any impropriety in lending the moncy to.him, nor was any specific relief prayed in this respect. It was within the powers of the deed to lend to a brother director, and however foolish the loan might have been, so long as it was within the powers of the directors, the court could not interfere and make them liable. They were intrusted with full powers of lending the money, and it was part of the business of the concern to trust people with money, and their trusting to an undue extent was not a matter with which they could be fixed, unless there was something more alleged, as, for instance, that it was done fraudulently and improperly and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd their conduct might seem, it was the misfortune of the company that they chose such unwise directors: but as long as they kept within the powers of their deed, the court could not interfere with the discretion exercised by them."

To pass now from the English to the American cases: Koehler v. The Black River Falls Iron Co., 2 Black S. C. 715, was a case of fraud. Mr. Justice Davis said: "Instead of honestly endeavoring to effect a loan of money advantageously for the benefit of the corporation, these directors, in violation of their duty and in betraval of their trust, secured their own debts to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests intrusted to their management. They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation." In Scott v. Depeyster, 1 Edw. Ch. Rep. 513, the object of the bill was to make the directors liable for money embezzled by their secretary on the ground of their negligence. So, in Robinson v. Smith, 3 Paige 222, the bill alleged that the directors had engaged in a gambling speculation in stocks, wholly unauthorized by the charter, which was carried on to subserve their own individual interests and purposes. On demurrer to the bill, it was of course held that the directors of a corporation, who wilfully abuse their trust or misapply the funds of the company by which a loss is sustained, are personally liable as trustees to make good that loss, and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. In the same category is Taylor v. Miami Exporting Company, 5 Hammond (Ohio) 162; Verplanck v. Mercantile Insurance Co., 1 Edw. Ch. Rep. 84; Bank of St. Mary v. St. John, 25 Alab. N. S. 566; Butts v. Wood, 38 Barb. 181; s. c. 37 New York 317. In The Franklin Fire Insurance Co. v. Jenkins, 3 Wend. 130, which was an action on the case in which the declaration alleged against directors "want of care and attention," and also "corrupt and wilful mismanagement," a demurrer was sustained Sutherland, J., remarking: "These are very different allegations and require distinct and different answers." Lexington & Ohio Railroad Co. v. Bridge, 7 B. Monroe 556, was a bill by creditors against directors for making a dividend when no profits existed. "We are satisfied," say the court, "that if they were guilty of negligence to any extent it is not of that gross and palpable character that would render their conduct so reprehensible as to subject them to the imputation of a personal or even a legal fraud." In Godbold v. Branch Bank at Mobile, 11 Alab. 191, it was decided that the directors of a bank are not responsible for an injury to the bank caused by their act, originating in an error of judgment, unless the act be so grossly wrong as to warrant the imputation of fraud or the want of the necessary knowledge for the performance of the duty assumed by them on accepting the agency. In Hodges v. New England Screw Co., 1 Rhode Island 312, in dismissing the bill, Greene, C. J., observed: "It does not appear that the directors sought or secured to themselves any benefit or advantage which was not common to all the other stockholders of the Screw Company." See also Neall v. Hill, 16 California 145.

It seems unnecessary to pursue this investigation any further. These citations, which might be multiplied, establish, as it seems to me, that while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or codirectors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the managing body.

In regard to the question last adverted to, whether the defendants should be held responsible for any of their acts and investments as ultra vires, it might be sufficient to notice the fact that the charter of this corporation was a very complicated one, made up by comparing together no less than sixteen different acts of incorporation or supplements. The ingenuity of the young gentlemen of counsel for the defendants has been exercised in presenting to the court a genealogical map or pedigree, tracing the Acts of Assembly, from one to another. To have mistaken the extent of their powers under such circumstances would not have been matter of surprise even in the most timid and cautious. We may adopt upon this point the language of C. J. Greene in Hodges v. New England Screw Co., 1 Rhode Island 312. "In considering the question of the personal responsibility of the directors we shall assume that they violated the charter of the

Screw Company. The question then will be, was such violation the result of mistake as to their powers, and if so did they fall into the mistake from want of proper care, such care as a man of ordinary prudence practises in his own affairs. For, if the mistake be such as with proper care might have been avoided, they ought to be liable. If, on the other hand, the mistake be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the Screw Company, they ought not to be liable." We may say in this case, conceding that the directors did violate the charter, it was a question upon which with all due care they might have made an honest mistake; and moreover, it appears by the evidence, and is so reported, that they acted throughout by the advice of their counsel. It is well settled that trustees will be protected from responsibility under such circumstances: Lewin on Trusts 595; Vez v. Emery, 5 Ves. 141; Calhoun's Estate, 6 Watts 189.

Decree affirmed.

HUN v. CARY.

1880. 82 New York, 65.1

EARL, J. This action was brought by the receiver of the Central Savings Bank of the city of New York, against the defendants, who were trustees of the bank, to recover damages which, it is alleged, they caused the bank by their misconduct as such trustees.

The first question to be considered is the measure of fidelity. care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and cestui que trust. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it 1 Statement and arguments omitted. - ED.

would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them — the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty — crassa negligentia — not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. (First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278.) What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning - as something nearly approaching fraud or bad faith - I cannot yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for crassa negligentia, which literally

means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case.

[The learned Judge here quoted from various authorities.]

In Spering's Appeal, Judge Sharswood said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. (Story on Bailments, § 182.) Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust.

Enough has now been said to show what measure of diligence, skill and prudence the law exacts from managers and directors of corporations; and we are now prepared to examine the facts of this case, for the purpose of seeing if these trustees fell short of this

measure in the matters alleged in the complaint.

[The bank was incorporated in 1867, and did business until 1875, when a receiver was appointed. During this time the deposits averaged about \$70,000. From 1867 to 1873 the total expenses, including interest paid to depositors, exceeded the income. In 1873 the trustees of the bank, which had hitherto occupied hired premises, purchased, in behalf of the institution, four lots of land, with a view to erecting a bank building upon one of the lots. The greater part of the purchase price was secured by mortgages on the lots. At the time of purchase the bank became obligated to erect upon the corner lot a five story building. Such a building was thereafter erected at an

expense of about \$27,000. The other lots were disposed of without loss. The corner lot had cost the bank \$29,250 (presumably its fair value), exclusive of the building. It was mortgaged for \$30,500. When the receiver was appointed, that lot and building, and other assets which produced less than \$1000, constituted the whole property of the bank, and subsequently the lot and building were swept away by a mortgage foreclosure. The present action was brought to recover the damages caused to the bank by the alleged improper investment of its funds, as above stated.¹]

At the time of the purchase of the lot, the bank was substantially insolvent. If it had gone into liquidation, its assets would have fallen several thousand dollars short of discharging its liabilities, and this state of things was known to the trustees. It had been in existence about six years, doing a losing business. The amount of its deposits, which its managers had not been able to increase, shows that the enterprise was an abortion from the beginning, either because it lacked public confidence, or was not needed in the place where it was located. It had changed its location once without any benefit. It had on hand but about \$13,000 in cash, of which \$10,000 were taken to make the first payments. The balance of its assets was mostly in mortgages not readily convertible. One was a mortgage for \$40,000, which had been purchased at a large discount, and we may infer that it was not very salable, as the trustees resolved to sell it as early as May, 1873, and in August, 1873, authorized it to be sold at a discount of not more than \$2500, and yet it was not sold until 1874. In this condition of things the trustees made the purchase complained of, under an obligation to place on the lot an expensive banking-house. Whether, under the circumstances, the purchase was such as the trustees, in the exercise of ordinary prudence, skill and care, could make; or whether the act of purchase was reckless, rash, extravagant, showing a want of ordinary prudence, skill and care, were questions for the jury. It is not disputed that, under the charter of this bank, as amended in 1868 (chap. 294), it had the power to purchase a lot for a banking-house "requisite for the transaction of its business." That was a power, like every other possessed by the bank, to be exercised with prudence and care. Situated as this moribund institution was, was it a prudent and reasonable thing to do, to invest nearly half of all the trust funds in this expensive lot, with an obligation to take most of the balance to erect thereon an extravagant building? The trustees were urged on by no real necessity. They had hired rooms where they could have remained; or if those rooms were not adequate for their small business, we may assume that others could have been hired. They put forward the claim upon the trial that the rooms they then occupied were not safe. That may have been a good reason for making them

¹ The passages enclosed in brackets [] are an abridgment of the recitals of fact in the opinion of the court. — ED.

more secure, or for getting other rooms, but not for the extravagance in which they indulged. It is inferable, however, that the principal motive which influenced the trustees to make the change of location was to improve the financial condition of the bank by increasing its deposits. Their project was to buy this corner lot and erect thereon an imposing edifice, to inspire confidence, attract attention, and thus draw deposits. It was intended as a sort of advertisement of the bank, a very expensive one indeed. Savings banks are not organized as business enterprises. They have no stockholders, and are not to engage in speculations or money-making in a business sense. are simply to take the deposits, usually small, which are offered, aggregate them, and keep and invest them safely, paying such interest to the depositors as is thus made, after deducting expenses, and paying the principal upon demand. It is not legitimate for the trustees of such a bank to seek deposits at the expense of present depositors. It is their business to take deposits when offered. It was not proper for these trustees — or at least the jury may have found that it was not — to take the money then on deposit and invest it in a bankinghouse, merely for the purpose of drawing other deposits. In making this investment, the interests of the depositors, whose money was taken, can scarcely be said to have been consulted.

It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazard of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank.

We conclude, therefore, that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

[Omitting remainder of opinion.]

**Judgment* [on verdict for plaintiff] affirmed.

SWENTZEL v. PENN BANK.

1892. 147 Pa. State, 140.1

Bill in Equity, praying that directors of the Penn Bank be decreed to pay all moneys lost by their carelessness, negligence and fraudulent management. Facts found by a master, who recommended that the bill be dismissed as to most of the defendants. The assignee of the Bank filed exceptions to the report, and alleged error in various rulings and decrees made in the court below.

H. A. Miller, D. F. Patterson, and A. M. Brown, for the assignee. S. Schoyer, Jr., D. T. Watson, and others, for various defendants.

PAXSON, J. . . . Briefly stated, the bill was filed for the purpose of holding the officers and directors of the bank responsible for the losses resulting from its failure. It is claimed that the officers and directors were negligent in their management of the bank's affairs, and that by reason of such negligence the losses occurred.

It is conceded on all sides that the losses and the disastrous failure of the bank were directly traceable to Mr. Riddle, its late president, now deceased. He practically emptied the vaults of the bank in carrying on a gigantic speculation in oil. This was done with the knowledge of the cashier, and the cooperation of one or more clerks or subordinates. It would have been extremely difficult, if not practically impossible, for any person to have committed such a swindle without the cooperation of some one inside. The question is whether the directors ought to have known of these transactions, and whether their failure to know what the real plunderer was doing, was such negligence on their part as to render them liable to the creditors of the bank.

The Penn Bank closed its doors in May, 1884. It is not too much to say that its failure was a great shock to the business interests of Pittsburgh. It was the cause of much excitement; led to a large amount of litigation, much of it directed against the board of directors. As usual, in such cases, the current of public opinion was turned against them, and up to the present time they have been defending themselves against hostile litigation. The time has now arrived when the rights of the parties can be considered calmly, and disposed of in disregard of prejudice or popular clamor.

The first question that naturally suggests itself for our consideration is, the extent of the duty which the directors of a bank owe to the stockholders, whom they represent directly, and the creditors, whom they represent indirectly.

Upon this point there is a general misapprehension in the popular mind. This finds expression, after bank failures, in severe condemnation of directors, and a general assertion of the doctrine that their

¹ Statement abridged. Arguments and part of opinion omitted. - Ed.

duty requires them to be familiar with all the details of the management. In the popular mind they are held to the rule that they ought to take the same care of the affairs of the bank that they do of their own private business. Even the learned judge below evidently adopted this view, when he said in his opinion: "If we were to decide this case on first impressions, as to the conclusions of fact to be drawn, and under the decisions cited and rules laid down in the minority opinion in *Briggs* v. *Spalding*, we would say there was gross negligence, or want of the ordinary care that a man of fair intelligence would take of his own affairs."

It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatory. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods - generally once or twice a week — for an hour or two. The condition of the bank is then laid before him, in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank, in which he participates. The cash on hand is counted, the bills receivable and sureties examined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of / his own affairs.

A vast amount of authority has been cited upon this question, which we do not think it necessary to review. It is sufficient to refer to a few cases only. In Spering's Ap., 71 Pa. 11, the subject is very fully discussed by the late Justice Sharswood, and the rule of ordinary care is laid down. Not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank. Negligence is the want of care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons, from whom he receives no compensation.

The same learned judge, in Maisch v. Saving Fund, 5 Phila. 30, laid down the rule as follows: "As to the directors, however, receiving no benefit or advantage, they can be considered only as gratuitous mandatories, liable only for fraud or such gross negligence as amounts to fraud." Again, in Spering's Ap., supra, he said: "Indeed, as the directors are themselves stockholders, interested, as well as all others, that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill."

We may also refer to *Briggs*, *Receiver*, v. *Spaulding* 141 U. S. 132, which goes even further than our own cases upon this point. It does not relieve a director from the consequence of gross negligence in the performance of his duty, but it holds that he is not responsible where he has used the ordinary care which bank directors usually exercise. It is true this was the case of a national bank, but we apprehend that what is negligence on the part of a director of a national bank, would, as a general rule, be negligence by a director of a state bank, and subject to the same liability.

In regard to what is ordinary care, regard must be had to the usages of the particular business. Thus, if the director of a bank performed his duties, as such, in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that he was guilty of gross negligence. And care must be taken that we do not hold mere gratuitous mandatories to such a severe rule as to drive all honest men out of such positions. thought is so well expressed by Sir George Jessel, M. R., in his opinion in In re Penn Coal Mining Co., 10 Ch. Div. 450, that I give his remarks in full: "One must be very careful in administering the law of joint-stock companies, not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and, perhaps, all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as direc-Willful default no doubt includes the case of a neglecting to sue, though he might, by suing earlier, have recovered a trust fund; in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle."

Holding, then, the rule to be that directors, who are gratuitous mandatories, are only liable for fraud, or for such gross negligence as amounts to fraud, it remains but to apply this principle to the facts of this case.

It is not alleged — it has never been alleged — that the hands of these directors are stained by fraud. The bank was wrecked by its

president, with the cashier and some of the clerks aiding and abetting.) It was adroitly done, so far as the means were concerned, and it was) concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The reports of the bank's condition, made by the president to the directors, from time to time, showed it to be in good condition, while in point of fact it was honeycombed with fraud, and its assets squandered in wild speculations. It may be asked, why did not the directors discover this by an examination of the books? The answer is, that, if they had examined every book in the bank, with a single exception, they would not have found the fraud. That exception is the individual ledger. All the frauds were dumped into this book, and appeared nowhere else. The individual ledger contains the accounts of the individual depositors, and this book, by the rules of a large majority of the Pittsburgh banks, the directors are not allowed to see. This is a rule of policy on the part of most city banks, and the reason for it is, at least, plausible. A director, largely engaged in business, may have a number of rivals in the same business who are depositors in the bank. If he is permitted to examine their accounts it gives him an advantage and an insight into a rival's affairs that few business men would tolerate. Hence, it is a question with many banks whether to adopt this rule or lose valuable customers, and they generally prefer the former. We are. not speaking of the wisdom of the rule, only of its existence, as bearing upon the question of the directors' negligence. Are they to be held to be guilty of gross negligence in not examining a book, which, by the rules of their own bank, and of four fifths of the other banks in Pittsburgh, the directors were not permitted to see?

Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high; they were the trusted agents of the corporation; paid for their services, and regarded in the community in which they lived as honest men.

Aside from this, the directors were among the heaviest stockholders of the bank. They collectively owned a large proportion of it. And so thoroughly were they deceived by the president as to its condition that, when the first stoppage occurred, they not only believed the suspension was temporary, but they showed their faith by their works, and upon their individual credit raised the sum of \$289,000 to enable it to resume. They did not desert the ship like a parcel of drowning rats, but imperiled their private fortunes in an effort to keep it afloat. Under such circumstances it would be an act of gross injustice to hold them liable for the frauds of others, in which they had not participated — of which they had no knowledge — and which have only been brought to light with the aid of experts. We must measure this transaction by the light which these directors had at the time the

transaction occurred. It would be unfair to judge them by the calcium light which has been turned on for six years, and which has enabled us to trace at last the sinuous path of Riddle and his confederates in crime, and the means by which this bank has been robbed and plundered. We are of opinion that the master and the court below were right in their conclusion, and the decree is affirmed upon the appeal of the assignee, and the appeal dismissed at his costs.

[Omitting opinion on other assignments of error.]

GIBBONS v. ANDERSON.

1897. 80 Federal Reporter, 345.

IN U. S. Circuit Court, Western District of Michigan.

SEVERENS, District Judge. The bill in this case was filed by the complainant, as receiver of the City National Bank of Greenville, to establish the liability of the defendants, Foster and Anderson, who were directors of the bank, for negligence in the performance of their duties as such, which it is alleged has resulted in a heavy loss to the bank and its creditors. The bank was organized April 28, 1884, with a capital stock of \$50,000. It suspended on the 22d day of June, 1893. The complainant was appointed receiver thereof by the comptroller of the currency five days later, and on July 1, 1893, entered upon the discharge of his duties. The total liability of the bank to its creditors at the time of its failure was \$237,733. The nominal value of its assets was about \$326,000, but the total net amount which the receiver has been able to realize from the assets is only about \$40,000. This result is certainly a very startling one, and the enormous loss in the liquidation of the bank's assets calls for an inquiry for its causes. And they are not far to seek. The defendants were members of the board of directors from its organization to the date of its suspension. Le Roy Moore was another director, and, either in the capacity of cashier or president, was its managing officer during the whole of the bank's operations. If during part of the time another person was cashier, he was only nominally such. Moore dominated the bank, and exercised the functions of cashier. Upon investigation it turns out that substantially from the beginning Moore employed the bank for the promotion of his own business enterprises, and, to a steadily increasing amount, has in one way and another diverted its funds to his own use, to the extent that at the date of the suspension of the bank he was indebted to the bank upon paper of which he was the maker in the sum of \$36,263.63, and as indorser in his own name in the sum of \$44,819.59. He was also liable as indorser under the name of Le Roy Moore & Co. in the sum of \$17,419.97. No other person than Le Roy Moore was liable for these

indorsements of Le Roy Moore & Co.: the other member having long since been discharged by the renewal of paper and the extension of credit without his knowledge, - that firm having been dissolved in 1887, and the liabilities thereof assumed by Moore. There was also in the bank at the time of its suspension, representing part of its assets, paper upon which the Stanwood Manufacturing Company was maker to the amount of \$8,750, and upon which it was indorser, \$67,-748.54, amounting in all to \$76,498.54. This Stanwood Manufacturing Company was a business concern of which Moore was the owner, with a trifling exception. He owned 2,400 of the 2,500 shares of \$10 each, and, so far as appears, only 20 other shares were taken. The books of the company show that \$15,000 only of its capital stock were paid in, and this by Le Roy Moore's individual promissory notes, upon which he never made any payment. The bank had a chattel mortgage on all its property, and the sum of \$3,500 was the sum realized out of the sale of that property under this mortgage. Over \$63,000 of paper held by the bank, upon which the Stanwood Manufacturing Company was indorser, consisted of accommodation notes made by the employes about the factory of the Stanwood Manufacturing Company, and was worthless. This paper was all unloaded upon the bank by Moore in the prosecution of his own enterprises, and operated practically as a credit to himself. For a number of years prior to the suspension of the bank he was a borrower from it, either upon his own name, or under a guise so thin as to be transparent, to an amount grossly in excess of the legal limit. The comptroller in his letter of October 14, 1892, states that at the last examination he was directly indebted to the bank in the sum of \$29,565. In all these ways, direct and indirect, Moore converted the assets of the bank to his own use, and in the end it appears that for all these large sums which Moore had obtained, and which were represented by paper which he had employed for that purpose, amounting to \$172,768.88, only a very little can be realized. Moore made a trust deed of all his property to secure the debts he owed to the bank, out of which not more than \$12,000 to \$15,000 can be realized. This is the result, not of a single fraud, nor of a group of contemporaneous frauds, practiced by Moore, but, as already stated, it is the consequence of malversation of the funds of the bank from about the beginning of its history. It is needless to go into detail. The books of the bank show that he was going deeper and deeper into the funds of the bank, and, under one cover or another, converted of its assets more than three times the amount of its capital stock. The defendants, who were directors all this time, say that they were ignorant of anything wrong in the affairs of the bank until their eyes were opened to the facts by its failure. Greenville is a small place, of only about 3,000 inhabitants, and the defendants resided there. The volume of the business of the bank was comparatively small, - certainly not so large but that the most cursory examination of the general features of its business by

any one having ordinary business intelligence would have disclosed the truth. It is contended by the directors that they did not in fact know how Moore was carrying the substance out of it, and it is the more charitable view to take of their conduct to the extent that supine negligence is more easily excused than active fraud. There is in the record the testimony of witnesses stating that at the time of the failure of the bank these defendants declared that they trusted all to the president, and that they knew but little of the bank's affairs, relying as they did upon their confidence in the management. But what else can be said than that, if they had notice of the facts, they were culpable, or that, if they did not know them, they were grossly negligent and inattentive to their duties? The testimony convinces me that the latter is the fact, and that their negligence and lack of interest was so profound that not even the disclosures and the warning contained in the letter of the comptroller of October 14, 1892, and which, pursuant to his request, was brought to their attention, aroused them from the stupor which beset them; for the situation was in no wise redeemed, and grew steadily worse without the moving of a hand by the directors to save it. From the time of their election the board of directors seems to have slumbered over the affairs of the bank while its managing officer was plundering it of all that it owned, and much that belonged to others. Once in a while there seems to have been some faint consciousness, but nothing which indicates any activity. But they say, and have called witnesses to prove, that acting in accord with the usage and custom of national banks, and having called into the management a person in whom they had entire confidence, which was justified by his reputation, and committed the affairs of the bank to him, they were not bound to have doubt and distrust of his correct dealing until something occurred which should arouse suspicion. And this is their defense. The learned counsel for the defendants puts the question thus:

"Whether a director in a national bank is individually liable for loss to the bank accruing through another director, viz. its president, when such mismanagement was not known to or participated in by the directors sought to be charged."

Or, in another form:

"Whether an individual director in a national bank is liable in his individual capacity for all losses occasioned by the mismanagement of the bank's affairs by a trusted officer through the neglect of the board of directors to meet and examine into the affairs of the bank."

These questions present in the most favorable light for the defendants what is undoubtedly the substance of the inquiry upon the facts which existed in this case, and which is, in short, this: Whether the duty of the board of directors is discharged by the selection of officers of good reputation for ability and integrity, and then leaving the affairs of the bank without any other supervision or examination than mere inquiry of the officer, and relying upon his statements until some cause for suspicion attracts their attention. Section 9 of the national banking act, being section 5147 of the Revised Statutes, provides that:

"Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association."

And by section 5145 it is declared that the affairs of such association shall be managed by not less than five directors. The oath which the director is required to take, that he will diligently and honestly administer the affairs of such association, indicates the scope of his obligation. The management of the bank is cast upon the board of directors. The duty of managing and administering the affairs of the bank by the board of directors has been differently construed in decisions bearing upon this subject, but it is not necessary for me to analyze the cases, or to reconcile their apparent differences. Some of them have gone to a length which in my opinion is extremely dangerous to the public safety, and, if generally applied, would make these banking associations, which were designed to supply the people of the country with financial institutions hedged about with security on which their confidence might securely rest, the objects of doubt and distrust. The rule of decision by which my judgment in the present case must be guided is laid down in the case of Briggs v. Spaulding. 141 U.S. 132, 11 Sup. Ct. 924. Much of the discussion in that case was devoted to the consideration of the special circumstances upon which rested the charges made against the several directors. Those circumstances have little or no resemblance to those of the present case, and not much aid is afforded by that part of the discussion; for, as the court in that case observed, each case must stand upon its own facts. The directors in that case were held to be excusable. One very important and noticeable difference between that case and this is in the fact that the question there was narrowed down to one of fact, as to whether the defendants were fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, the previous condition of the bank being admitted to have been good, whereas in the present case the defendants' neglect runs through quite a number of years. But the court laid down certain general rules by which the obligation of directors of national banks is to be tested; that is to say, they declare what is the minimum of that obligation. Chief Justice Fuller, delivering the opinion of the court, said: —

"We hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision; nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."

In my opinion, it does not meet the requirements of this statement of the law that directors may confide the management of the operations of the bank to a trusted officer, and then repose upon their confidence in his right conduct, without making examinations themselves, or relying upon his answers to general questions put to him with regard to the status of the affairs of the bank. To begin with, it is to be assumed in every case that the directors have not selected any other than a man of good reputation for capacity and integrity. Any other idea assumes that they have been guilty at the outset of a glaring fault. Further, it is a well-known fact that a large proportion of the disasters which befall banking institutions come from the malfeasance of just such men, and it would be manifest to everybody that only a satisfactory and quieting reply would be made by the official who has any reason for concealment. Again, what are the duties of management that are committed to the cashier, or the officer standing in his place? They are those which relate to the details of the business, to the conduct of particular transactions. Even in respect of those, his duties are conjoint with those of the board of directors. In large affairs it is his duty to confer with the board. In questions of doubt and difficulty, and where there is time for consultation, it is his duty to seek their advice and direction. It is his duty to look after the details of the office business, and generally to conduct its ordinary operations. It is the right and duty of the board to maintain a supervision of the affairs of the bank; to have a general knowledge of the manner in which its business is conducted, and of the character of that business; and to have at least such a degree of intimacy with its affairs as to know to whom, and upon what security, its large lines of credit are given; and generally to know of, and give direction with regard to, the important and general affairs of the bank, of which the cashier executes the details. They are not expected to watch the routine of every day's business, or observe the particular state of the accounts, unless there is special reason; nor are they to be held responsible for any sudden and unforeseen dereliction of executive officers, or other accidents which there was no reason to apprehend. The duties of the board and of the cashier are correlative. One side are those of an executive nature, which relate mainly to the details. On the other are those of an administrative character, which relate to direction and supervision; and supervision is as necessarily incumbent upon the board as direction, unless the affairs of banks are to be left entirely to the trustworthiness of cashiers. Doubtless there are many matters which stand on middle ground, and where it may be difficult to fix the responsibility, but I think there is no such difficulty here. The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused,

which generally does not happen until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it further provided for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier, and a president as well. The banks themselves are prone to state, and hold out to the public, who compose their boards of directors. The idea is not to be tolerated that they serve as merely gilded ornaments of the institution, to enhance its attractiveness, or that their reputations should be used as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests should be committed to one man, without oversight and control.

Recurring to the present case, it is clear that unless the board of directors is to be absolved upon the theory that they were justified in committing the affairs of the bank to Moore, and relying upon his good conduct, and his answers to the perfunctory questions which were occasionally put to him, until they were brought to the facts by the collapse of the bank upon the first prick of a financial stringency such as came upon the country in the summer of 1893, they must be held liable. It is with sincere commiseration and regret that the court feels compelled to reach this conclusion, in view of the consequence which must follow to these directors. But there is another side to this matter. The court cannot ignore the rights and interests of the depositors and others who have trustfully confided their money to the bank, and who now find that it was run through a shell into the hands of Moore, while the defendants turned their heads away, and failed to give them the protection which a proper discharge of their duties would have afforded. The records of the board of directors make a sorry showing, when put in contrast with the financial history of the bank. The entries are few, at long intervals, and are almost wholly limited to the election of directors and the declaration of dividends. They are feebly supplemented by the oral testimony of the

defendants, which tends only to show that individual inquiries were occasionally made by them, of a comparatively superficial character. There was no examination of the books; at least, none of any value. If there had been such examination by a fairly intelligent man, such as a director promises he is, the condition of things would have been seen. It is not irreconcilable with what they declared, when the bank failed, with respect to their knowledge of its affairs, and with what I must believe was substantially the truth of the matter. It may be conceded that the members of the board were not responsible for the malfeasance or nonfeasance of their associates. where the fault of the others was not known to them, and they were helpless to prevent the consequences; but in the present case the charge of negligence rests upon the whole board, and there is nothing to show that the defendants took any steps to retrieve the consequences of the joint negligence. If the defendants had been able to show that they themselves had done what they could to induce the board to attend to its duty, a different case would be presented. I do not understand why the comptroller did not more energetically interfere, but I have no duty to criticise his action.

[The learned Judge then held, that the date from which the directors should be charged with losses was July 1, 1892; when the fact that a year had elapsed without the declaration of a dividend should have induced the directors to institute an examination.]

Decree to be entered in conformity with the above opinion.

DOVEY v. CORY.

House of Lords, Aug. 1, 1901. 17 Times Law Reports, 732.1

This was an appeal from the decision of the Court of Appeal (the Master of the Rolls, now Lord Lindley, Sir F. H. Jeune, and Lord Justice Romer), which reversed a judgment of Mr. Justice Wright. The hearing before the Court of Appeal (sub nomine "In re National Bank of Wales") is reported in 15 The Times L. R. 517; L. R. (1899) 2 Chan. 629; and 68 L. J. Chan. 634.

The appellant is the liquidator of the National Bank of Wales, and the Metropolitan Bank (of England and Wales) have purchased and taken over its assets and liabilities. The respondent, John Cory, was for some years a director of the National Bank. In the liquidation of the latter a summons was taken out to render the respondent liable—not to creditors, all of whose claims had been satisfied—but to the contributories, in respect to alleged misfeasance (1) in paying dividends out of capital; (2) in making improper advances to directors;

¹ Portions of the opinions are omitted. The case will be officially reported in Law Reports (1901), Appeal Cases.—Ed.

and (3) in making improper advances to customers who were, or were reputed to be, insolvent, and the summons asked that the respondent should be ordered to repay the full amount of all losses caused by such acts of alleged misfeasance with interest and costs. Mr. Cory became a director on November 23, 1883, and resigned on December 18, 1890. The summons asked that the respondent should be deprived of the benefit of the Trustee Act, 1888, and of the Statutes of Limitation, on the ground that the losses arose from the respondent's wrongful acts and fraudulent concealment of the true state of affairs. The appellant's counsel, however, disclaimed the imputation of any moral obliquity on the part of the respondent, but argued the question on the basis of negligence and failure to discharge the duties of a fiduciary position. The transactions complained of were voluminous and ranged over a series of years and related to the affairs not only of the head office, but of the branches, which in 1890 were 33. was, however, found possible by the parties to condense the story within the limits of four volumes and about 1500 pages. In February, 1893, an agreement was entered into between the National Bank of Wales and the Metropolitan, Birmingham, and South Wales Bank, now the Metropolitan Bank (of England and Wales) (Limited) whereby the latter bought the assets and goodwill and undertook the liabilities and contracts of the former, the value of the assets and goodwill being taken at not less than £110,000. Voluntary resolutions were passed for winding up the National Bank, and Thomas Cory, its former chairman, and the appellant were appointed liquidators. Mr. Thomas Cory subsequently resigned and the appellant became sole liquidator. The alleged amount of improper payments of dividends was £52,986; of loss on advances and credits to directors to December 31, 1890, £37.731, and of loss on improper advances to customers, £43,087. The whole of the assets were realized or valued, and the appellant Dovey alleged that after discharging the liabilities of the National Bank and crediting it with the value of its assets and £110,000 as its goodwill, there remained a deficiency of assets amounting to £84,392. Calls were made of £2 10s. per share each in July, 1896, and September, 1899. Mr. Justice Wright ordered the respondent to pay £54,787, being £37,000, the aggregate amount of dividends paid to the shareholders in 1887, 1888, 1889, and 1890 (except a part of the last dividend), and as to the balance, interest at 5 per cent. on each of the dividends. The learned Judge held that all these dividends were in fact paid out of capital; but he declined to make the respondent liable for improper advances to directors or customers. The Court of Appeal, in an elaborate judgment delivered by the Master of the Rolls, exonerated the respondent from liability. This decision was affirmed by the noble and learned Lords.

Sir R. T. Reid, K. C., Ingpen, K. C., and S. T. Evans, for appellant. Swinfen Eady, K. C., Rufus Isaacs, K. C., G. F. Hart and E. A. Nevean. for respondent.

Sheldon, for Metropolitan Bank of England and Wales, which was

originally a respondent, but subsequently made an appellant.

The LORD CHANCELLOR, [LORD HALSBURY]. - In this case the liquidator of the National Bank of Wales (Limited) appeals against a judgment of the Court of Appeal, whereby Mr. John Cory, the respondent, was discharged from the liability which Mr. Justice Wright's judgment had imposed upon him to pay £37,000 for the benefit of the shareholders of the company, in respect of dividends already distributed, and a further sum for interest. Mr. John Cory was a director of the company, and it is for his supposed misconduct in the management of the affairs of the company that this liability was imposed upon him. It is alleged and proved that certain losses have been sustained by the company, and the ground upon which Mr. John Corv is sought to be made liable is the very short and intelligible ground that he was a party to false and fraudulent statements as to the position of the company and had had a share in causing these losses. The Court of Appeal have acquitted him of any knowledge of what was falsely stated, and Sir Robert Reid, in opening this appeal, stated to your Lordships that he did not intend, in arguing for Mr. John Cory's liability, to impute to him any moral obliquity. Now there is no doubt that there were balance-sheets laid before meetings of the shareholders which, to use the language of the articles of the association, were not proper and which did not truly report as to the state and condition of the company, and did not comply with the requirements of the articles in question in respect of the particular sum which the directors recommended as dividend, that it should be paid out of the profits, but a greater sum was paid out as dividend than would have been paid if certain things had been taken into consideration, and therefore larger than should have been paid. A great part of the judgment, both of Mr. Justice Wright and of the Court of Appeal, is occupied by discussing matters which are not now before your Lordships as matters in debate. It is now admitted that Mr. John Cory ceased to be a director in December, 1890. My Lords, I am clearly of the opinion that the judgment of the Court of Appeal is right and ought to be affirmed; but my opinion is entirely based upon the question of fact that he was guilty of no breach of duty whatever, and for reasons which I will refer to hereafter I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in view of the facts that I take, do not arise here; and in what I say I desire to be understood as only dealing with the facts of this particular case. Now, in the first instance, I will assume that the company has sustained loss by the issue of fraudulent balance-sheets, by the improper advance of money to the customers of the bank, and that it has also sustained loss by the lending of money to directors without security. With respect to the default involving liability, if Mr. John Cory was conscious of the falsehood it is not necessary to go any further. Like any one else who is a party to a false statement acted upon to the prejudice of the person to whom it is made, he would be liable to the extent to which his falsehood has inflicted loss on his victims, but after the admission that has been made it is unnecessary to pursue this head of inquiry; he certainly could not be acquitted of moral obliquity if party to a fraudulent statement; but it is said he has so grossly neglected his duty as a director that, though he may not have known the true state of the facts, he ought to have known them, and his breach of duty in that respect renders him liable. In order to see how far this obligation is made out it is necessary to consider what the business of the company was, and what was the position of Mr. John Cory in relation to it. My Lords, I think it is idle to talk in general terms of the duty of a director to look after the concerns of the company of which he is one of the managers without seeing what in the ordinary course of business he ought to do or to have done. Now there are some things which, of course, must be, or at all events ought to be, apparent to any one responsible for the conduct of a commercial business, and we must apply that observation to the business of which we are speaking - namely, a banking business; but I do not understand that any one has suggested that there was neglect or default by reason of the absence of some system under which, if honestly carried out, the interests of the bank would have been in that respect secured. It is admitted that (extract from judgment of the Court of Appeal) the company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks each with its own manager. The course of business was this. Each branch manager sent weekly to the head office what is called a weekly state — i. e., an account showing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office showing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine these documents and to report to the board anything disclosed by them which required their attention. The weekly states or quarterly returns were in the board rooms for reference in case of need, but unless attention was called to them the directors did not think it necessary to examine them. The chairman of the directors was Mr. Thomas Cory, a brother of Mr. John Cory. The chairman and general manager (Mr. Collins) visited each branch bank every year; and, in addition, two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the branch bank, appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts and to certify the annual balance-sheets and accounts laid before the shareholders only

saw the head office books and the returns from the branch offices certified by their respective managers to the head office. These certified returns formed part of the weekly states, but omitted much that they contained. The minutes of the directors' meetings show that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Mr. John Cory stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives. But it is suggested that Mr. Cory is responsible because this and other portions of the system were not faithfully adhered to. And, indeed, what is really made the test of his responsibility is that he did not find out what was fraudulently withheld from his knowledge. the warning letters of the auditor, which were never suffered to reach him, are suggested as warnings to him which he ought not to have neglected. Again, there was the insufficient striking out of bad and doubtful debts, by which it is alleged that the amounts paid in dividends to himself and other directors, as well as shareholders, are by a process of reasoning and calculation assumed to be payments out of capital. These things are all assumed to have been done as though done with knowledge and intention, while at the same time the admission is made that there was no evil mind or conscious fraud. Now I think such things, if done with evil mind and intention, would be fraud, and it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was surrounded. One was his own brother, another was the general manager, and, once I arrive at the conclusion that there were those about him whose interest and object it was to deceive him, I certainly do not think that the things which were designedly concealed from him are things which ought to be relied upon as matters for which he was responsible. In the view I take the whole of the evidence which is relevant and important to the question, did Mr. Cory knowingly permit the things to be done which were done - becomes to my mind entirely immaterial if one is to start with the assumption that he knew nothing about them. Dealing with the several heads of charge as they have been formulated in the judgment of Mr. Justice Wright - viz., negligence, breaches of trust in respect of advances made contrary to said articles of association, and payment of dividends out of capital. I think each and all of them may be disposed of by the proposition that Mr. Cory was not himself conscious of any one of these things being done, and that unless he can be made responsible for not knowing these things, as Mr. Justice Wright put it, unless he is shown to have exhibited a complete neglect of the duties he had undertaken, the charges are not made out. The charge of neglect appears to rest on the assertion that Mr. Cory, like the other

directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors — how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious that if there is such a duty it must render anything like an intelligent devolution of labor impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairman were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for debts and that he believed such assurances is involved in the admission that he was guilty of no moral fraud; so that it comes to this — that he ought to have discovered a network of conspiracy and fraud by which he was surrounded and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors themselves. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers - and the theory of his being free from all fraud assumes under the circumstances that he was - there appears to me to be no case against him at all. The provisions made for bad debts, it is well said, was inadequate, but those who assured him that it was adequate were the very persons who were to attend to that part of the business - and so of the rest. If the state and condition of the bank were what were represented, then no one will say that the sum paid in dividends was excessive. If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed and which came from the officers of the bank to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible, has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it, inasmuch as the question may arise when it may be necessary to decide it. I deprecate my premature judgment. My Lords, I am, as I have said, very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct. I doubt very much whether such questions can ever be treated in the abstract at all. The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital. Even the distinction between fixed and floating capital which in an abstract treatise like Adam Smith's "Wealth of Nations" is appropriate enough, may with reference to a concrete case be quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion. but as an illustration of what difficulties may arise the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnerships, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin. On the other hand, companies cannot at their will and without the precaution enforced by the statute reduce their capital; but what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do I, for one, decline to express any opinion not called for by the particular facts before us, and I am the more adverse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a Court of law. I move that this judgment be affirmed and this appeal dismissed with costs.

[LORD MACNAGHTEN delivered a short concurring opinion.]

LORD DAVEY. . . . The respondent, in his affidavit, states generally that he was from first to last under the honest and genuine belief that the affairs of the company were in a sound and solvent condition, and that its business was being carried on at a profit, and that its net profits for the time being were amply sufficient to justify the dividends which were from time to time during his directorship paid to the shareholders. And he adds that the general manager and branch managers were, so far as he knew, men of unquestioned confidence and integrity. and that he and his co-directors were compelled by the magnitude of the business and the exigencies of the case generally to rely upon (and he did rely upon) these officials in all ordinary matters relating to the accounts of customers and other questions of detail. And he deals specifically with the various matters alleged in the liquidator's evidence on the same lines. The respondent was cross-examined on his affidavit at great, but not unnecessary, length. I am not, I think, doing injustice to the appellant's case when I say that reliance was chiefly placed on the "weekly states" and "quarterly returns" made

by the branch managers, or that, if he cannot succeed in fixing the respondent with liability on these documents, his case fails. returns were laid on the table in the board room at each meeting of the directors. A comparative analysis of them, made by the skilled accountant who advises the appellant, does, I think, show that certain accounts which were treated as good by the general manager in the preparation of the balance-sheets submitted by him to the directors were, in fact, irretrievably bad, and it is difficult to acquit the general manager of improper conduct in including them as assets. The respondent says in his affidavit that the "weekly states" consisted each week of a very large and voluminous pile of sheets, which it would have taken the directors a couple of days to go through, and that it was the duty of the general manager to go through the weekly states, with the letters of the branch managers accompanying them, and to place upon the agenda any points arising upon them which he considered ought to be brought to the attention of the directors; and upon the discussion of such points the documents were, when necessary, referred to; but, except in such cases, the weekly states were not consulted by the directors, kut they relied on the general manager going carefully through them and drawing their attention to any matter requiring their consideration. On cross-examination he adhered to this statement. He added that the chairman also went through them often individually, and he did so for the board. He admitted that before recommending a dividend he did not look at all the accounts or look at the books themselves, but he said that the directors looked at the documents which were put before them by the manager — the amount which he considered was doubtful and bad — and they made a reserve for it. He also said that it was never brought before him that amounts due from bankrupt debtors were included in the balancesheets of each year, and he never heard of any single case of that kind. It further appeared from the evidence of other witnesses that the branches of the bank were regularly visited and their books examined by the chairman and two inspectors. In this state of the evidence, I ask whether the course of business at the board meetings as described by the respondent was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge that might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or alternatively, whether he was guilty of such neglect of his duty as a director as would render him liable to damages? I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in "Hållmark's Case" (9 Ch. D., 329), and by Mr. Justice Chitty in "In re Denham & Co." (25 Ch. D., 752), that directors are not bound to examine entries in the company's book. It was the duty of the general manager and, possibly, the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration, but the respondent was not, in my opinion, guilty in negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends.

[LORD BRAMPTON concurred.]

Judgment affirmed. Appeal dismissed.

SECTION III.

Special Interest of Director. — How affecting Action taken by Board.

Dealings between Director and Corporation.

1

ABERDEEN RAILWAY CO. v. BLAIKIE.

1854. 1 Macqueen, 461.2

In the House of Lords, on appeal from the Scotch Court of Session. The action was by Messrs. Blaikie, iron-founders in Aberdeen, against the Railway Company for performance of a contract whereby the Company had agreed to purchase and accept from Messrs. Blaikie certain iron chains, which they were to manufacture for the Company at the rate of 81. 10s. per ton. The summons concluded for implement of the contract or for damages.

The principal defence was, that Mr. Thomas Blaikie, the managing partner of the Pursuers, was at the time of the contract a Director, and indeed Chairman, of the Railway Company, and so incapacitated for dealing in the character with his own firm.

The Court of Sessions held that the Companies' Clauses Consolidated Act (8 Vict. c. 17, s. 88 & 89,) did not nullify the contract, although under it the contractor ceased to be a Director. They therefore decide in favor of the Pursuers. Hence this appeal.

 $^{^{1}}$ See also, post, chapter on Power of an insolvent Corporation to prefer particular Creditors. — Ed.

² Arguments and part of opinions omitted. — Ep.

The Solicitor General (Sir R. Bethell) and Mr. Gordon, for appellants. Mr. Rolt, and Mr. Macfarlane, for respondents.

The LORD CHANCELLOR (LORD CRANWORTH). . . . This, therefore, brings us to the general question, whether a Director of a Railway Company is or is not precluded from dealing on behalf of the Company with himself, or with a firm in which he is a partner.

The Directors are a body to whom is delegated the duty of managing the general affairs of the Company.

A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. (See Mr. Hudson's Case, 16 Beav. 485.) And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was possible to obtain.

It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person,—they may even at the time have been better.

But still so inflexible is the rule that no enquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

The principle was acted on by Lord King in Keech v. Sandford, Select Cases, temp. King, p. 61, and by Lord Hardwick in Whelpdale v. Cookson, 1 Ves. Sen. 8, and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer to what fell from that very learned and able judge in Ex parte James.

It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject matter of the agreement, but on the fiduciary character of the contracting party, and I can not entertain a doubt of its being applicable to a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land.

Was then Mr. Blaikie so acting in the case now before us? — if he

was, did he while so acting, contract on behalf of those for whom he was acting with himself?

Both these questions must obviously be answered in the affirmative. Mr. Blaikie was not only a Director, but (if that was necessary) the Chairman of the Directors. In that character it was his bounden duty to make the best bargains he could for the benefit of the Company.

While he filled that character, namely, on the 6th of February, 1846, he entered into a contract on behalf of the Company with his own firm, for the purchase of a large quantity of iron chairs at a certain stipulated price. His duty to the Company imposed on him the obligation of obtaining these chairs at the lowest possible price.

His personal interest would lead him in an entirely opposite direction, would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed, and I here see nothing whatever to prevent its application.

I observe that Lord Fullerton seemed to doubt whether the rule would apply where the party whose act or contract was called in question is only one of a body of Directors, not a sole trustee or manager.

But, with all deference, this appears to me to make no difference. It was Mr. Blaikie's duty to give to his co-Directors, and through them to the Company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole Director or only one of many, can make no difference in principle.

The same observation applies to the fact that he was not the sole person contracting with the Company; he was one of the firm of Blaikie, Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the Company as he could induce them to make.

It cannot be contended that the rule to which I have referred is one confined to the English law, and that it does not apply to Scotland

It so happens that one of the leading authorities on the subject is a decision of this House on an appeal from Scotland. I refer to the case of *The York Buildings Company* v. *Mackenzie*, decided by your Lordships in 1795.

The principle, it may be added, is found in, if not adopted from, the civil law. In the Digest is the following passage: "Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et quinegotia aliena gerunt." (Dig., Lib. xviii., t. 1, c. 34, s. 7.)

In truth, the doctrine rests on such obvious principles of good sense that it is difficult to suppose there can be any system of law in which it would not be found.

It was further contended that whatever may be the general principle applicable to questions of this nature the Legislature has in cases of corporate bodies like this Company modified the rule.

The statute, i. e. the Companies' Clauses Act, it was argued, has impliedly, if not expressly recognized the validity of the contract, by enacting that its effect shall be to remove the Director from his office; indicating thereby that a binding obligation would have been created, which would render the longer tenure of the office of Director inexpedient; and your Lordships were referred to the case of Foster v. The Oxford, Worcester, and Wolverhampton Railway Company. That was an action for breach of a contract under seal, whereby the defendants covenanted with the plaintiffs (as in the case now before your Lordships) to purchase from them a quantity of iron. The defendants pleaded that, at the time of the contract one of the plaintiffs was a Director of their Company, and to this plea there was a general demurrer.

That such a contract would in this country be good at common law is certain. The rule which we have been discussing is a mere equitable rule, and therefore all the Court of Common Pleas had to consider was how far the contract was affected by the statute. The decision was that the statute left the contract untouched, and that its operation was only to remove the Director from his office. The 85th and 86th sections of the English statute 8th and 9th Vict., c. 16, on which the Court proceeded, are in the same words as the 88th and 89th sections of the Scotch statute, and the Counsel of your Lordships' bar relied on this decision as being strictly applicable to the case now under appeal. But there is a clear distinction between them. In Scotland there is no technical division of law and equity. The whole question, equitable as well as legal, was before the Court of Session. All that the Court of Common Pleas decided was that a contract clearly good at law was not made void by an enactment that its effect should be to deprive one of the contracting parties of an office. This decision will not help the Respondents unless they can go further and show that the statute has had the effect of making valid a contract which is bad on general principles, that is to say, principles enforceable here only in equity, but not recognized in our Courts of common

I can discover no ground whatever for attributing to the statute any such effect.

Its provisions, however, will still be applicable to the case of Directors who become interested in contracts, as representatives or otherwise, and not by virtue of contracts made by themselves.

I have therefore satisfied myself that the Court of Session came to a wrong conclusion.

I therefore move your Lordships that this Interlocutor be reversed. [LORD BROUGHAM delivered a concurring opinion.]

Interlocutor reversed.

BENT v. PRIEST.

1881. 10 Missouri Appeals, 543.1

Action by the receiver of the St. Louis Mutual Insurance Company to recover securities alleged to have been paid to defendant to induce him, as a director of said company, to consent to a proposed transfer of the assets of the company to the Mound City Life Insurance Company.

It appeared that the Mound City Life Insurance Company agreed to pay a large sum to Peck, a stockholder in the St. Louis Co., for his services in procuring a reinsurance of the St. Louis Co. risks in the Mound City Co. Before the contract of reinsurance was effected, Peck promised to pay the firm of Priest & Wyman a certain sum in case the proposed reinsurance should be effected. Thereafter, Priest, in his capacity of director of the St. Louis Company, advocated and voted for the proposed measure, without disclosing the agreement between his firm and Peck. The firm of Priest and Wyman subsequently received valuable securities from Peck in satisfaction of his promise.

Upon the evidence, the court held, that this contract of reinsurance "must be taken to have been a valid one, beneficial alike to the selling and purchasing company, and to those beneficially interested therein."

Judgment below for plaintiff. Defendant appealed.

A. J. P Garesché, and John M. Holmes, for appellant.

Thomas T. Gantt, and John M. Glover, for respondent.

Thompson, J. . . . The principles of law applicable to this transaction are very familiar and very well settled. Directors of a corporation are regarded by courts of equity as trustees for the corporation and for its members. Great Luxembourg R. Co. v. Magnay, 25 Beav. 586; Gaskell v. Chambers, 26 Beav. 360; Hodges v. Screw Co., 1 R. I. 312. A court of equity will never permit a trustee, without the knowledge and consent of his cestui que trust, to speculate out of his trust. or to retain any gain which may have accrued to him personally therefrom, but will subject his conduct to a rigid scrutiny, and will compel him to account to his cestui que trust for all profits which he may make out of the trust relation. Ex parte James, 8 Ves. Jr. 337; Fawcett v. Whitehouse, 1 Russ. & M. 132; Hichens v. Congreve, 1 Russ. & M. 150, note; Kimber v. Barber, L. R. 8 Ch. 56; Bentley v. Craven, 18 Beav. 75; Gillett v. Peppercorne, 3 Beav. 78; Michaed v. Girod, 4 How. 503; Hamilton v. Wright, 9 Cl. & Fin. 111; Blisset v. Daniel, 10 Hare, 493; Tennant v. Trenchard, L. R. 4 Ch. 537; Bowes v. City, 11 Moo. P. C. 463; Tyrrell v. Bank, 10 H. L. Cas. 26 (affirming s. c. 27 Beav. 273). This rule is applied with full force to directors of

 $^{^{\}rm 1}$ Statement abridged from opinion. Arguments omitted; also the greater part of the opinion. — Ed.

corporations. Great Luxembourg R. Co. v. Magnay, 25 Beav. 586; Imperial, etc., Assn. v. Coleman, L. R. 6 H. L. 189 (reversing s. c. L. R. 6 Ch. 558); York v. Hudson, 16 Beav. 485; Parker v. McKenna, L. R. 10 Ch. 96; Parker v. Nickerson, 112 Mass. 195; Poor v. Railroad Co., 59 Me. 277; Redmond v. Dickerson, 9 N. J. Eq. 509; Pickering's Case, L. R. 6 Ch. 525; Madrid Bank v. Pelly, L. R. 7 Eq. 442; Ex parte Bennet, 18 Beav. 339; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Butts v. Wood, 37 N. Y. 317; Blake v. Railroad Co., 56 N. Y. 485. It may, we think, be stated as a universal application of this rule, that whenever a director of a corporation proposes to its shareholders, or to his co-directors, a contract, or, acting as such director, makes, assents to, or ratifies a contract for the corporation, from which he himself is to derive a secret profit, that profit belongs to the company, and he will be compelled, in a court of equity, to account for it and to surrender it up to the company. It is not essential to the liability of the director that the company has suffered a loss from what he has done; it is sufficient that he has gained a profit through it. Whether the contract which he has made, or in the making or ratification of which he has concurred, was in point of fact beneficial or injurious to the company, is wholly an immaterial inquiry. The broad principle is, that whatever he acquires by virtue of his fiduciary relation, except in open dealings with the company, such as a director in common with strangers may sometimes have, belongs not to him, but to the company. Nothing else than this satisfies the demands of the law.

[Remainder of opinion omitted.]

Judgment affirmed.

DAVIES, J., IN CUMBERLAND COAL CO. v. SHERMAN.

1859. 30 Barbour (N. Y. Supreme Court), 553, pp. 572, 573.

DAVIES, J. . . . There can be no question, I think, at the present time, that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature, towards his principal, and is subject to the obligations and disabilities incidental to that relation. . . .

Neither are the duties or obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his cestui que trust. The same principles apply to him as one of a number, as if he was acting as a sole trustee. It is not doubted that it has been shown, that the relation of the director to the stockholders is the same as that of the agent to his principal, the trustee to his

cestui que trust; and out of the identity of these relations necessarily spring the same duties, the same danger, and the same policy of the law.

In the language of the plaintiffs' counsel, it is justly said: "Whether it be a director dealing with the board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest, the principal is absent—the watchful and effective self interest of the director or trustee seeking a bargain, is not counteracted by the equally watchful and effective self interest of the other party, who is there only by his representatives, and the wise policy of the law treats all such cases as that of a trustee dealing with himself."

The number of directors or trustees does not lessen the danger or insure security, that the interests of the cestui que trust will be protected. The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self control. If five directors permit the sixth to purchase the property intrusted to their care, the same thing must be done with the others if they desire it. Increase of the number of the agents in no degree diminishes the danger of unfaithfulness. Whichcote v. Lawrence (3 Vesey, 740) was a case of several trustees. In this case Lord Loughborough says: "There was more opportunity for that species of management, which does not betray itself much in the conduct and language of the party, when several trustees are acting together. I am sorry to say there is greater negligence where there is a number of trustees."

HARLAN, J., IN JESUP v. ILLINOIS CENTRAL R. CO.

1890. 43 Federal Reporter, 483, pp. 499, 500.

Harlan, J. . . . A contract, in the name of a corporation, by its board of directors, is not void, if otherwise unassailable, simply because some of the directors, constituting a minority, used their position with the effect, or even for the purpose, of advancing their personal interests to the injury of the company they assumed to represent. The lease here in question, as we have seen, was approved by the nine directors of the Dubuque Company, five of whom had no personal ends to subserve by imposing upon the company a lease that was unreasonable or harsh in its terms. On the contrary, as already stated, at least four of that five were holders of the stock of the Dubuque Company, and therefore interested to guard it against unnecessary or improper burdens. We need not inquire as to the extent of their information touching the facts bearing upon the question of the proposed lease. It is sufficient to say that they approved it, and that their approval was not, so far as the record shows, obtained through misrepresenta-

tion or concealment by their co-directors, who, in view of their personal interest in the Cedar Falls Company, ought not to have participated in deciding the question of lease or in the making of the lease. An instructive case upon this point is U. S. Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio, 450, 465. That was a suit upon a contract by a railroad company for rolling stock. The contract was approved by eight directors of the former company (the whole number of directors being thirteen, but only eight acted), two of the number acting being also directors of and interested in the rolling-stock company. The defense was that the rent was not fair, nor the contract binding, because of the interest which some of the directors had in the rolling-stock company. The court said:—

"If it be granted that the confirmation of the contract by the defendant's board of directors, at the meeting of August 2, 1872, was voidable in equity at the election of the company, for want of the presence at that meeting of the board of a quorum of directors who were not directors of the plaintiff, it nevertheless appears that the board was composed of thirteen persons, a clear majority of whom were affected with no incapacity to act for the best interests of the company, and who sustained no fiduciary relation to the plaintiff whatever. This majority possessed ample power to restrain and control the action of the minority, and, if the contract was voidable at the option of the company, it had full power to express the company's election if it saw fit to avoid the contract. The fact that some of the persons composing this majority might vote with those who were members of both boards, and thereby create a majority in favor of the contract, would in no wise affect the validity of the transaction, nor relieve the board from the duty to move in the matter if they desired the company's escape from liability. We have not, upon the most diligent research, been able to find a case holding a contract made between two corporations by their respective boards of directors invalid. or voidable at the election of one of the parties thereto, from the mere circumstance that a minority of its board of directors are also directors of the other company. Nor do we think such a rule ought to be adopted. There is no just reason, where a quorum of directors sustaining no relation of trust or duty to the other corporation are present, participating in the action of the board, why such action should not be binding upon the company, in the absence of such fraud as would lead a court of equity to undo or set aside the transaction. the mere fact that the minority of one board are members of the other gives the company an opportunity to avoid the contract without respect to its fairness, the same result would follow where such minority consisted of but one person, and notwithstanding the board might consist of twenty or more. In our judgment, where a majority of the board are not adversely interested, and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness." . . .

CURTIN v. SALMON RIVER, &c., CO.

1900. 130 California, 345.1

APPEAL from Superior Court, Siskiyou County.

This action was brought for the foreclosure of a mortgage upon certain mining property, executed to the plaintiff's assignor by the president and secretary of the defendant. The defendant denied its execution of the note and mortgage, and upon this issue the court found in favor of the plaintiff and rendered judgment accordingly. The defendant moved for a new trial upon the ground that the decision was not sustained by the evidence. Motion denied. Appeal.

The defendant is a mining corporation organized under the laws of California, and is controlled and managed by a board of five directors. The mortgage upon which the action was brought was executed, July 24, 1897, to Wells, the assignor of the plaintiff, to secure a note of even date for money advanced by Wells. The note and mortgage were executed in pursuance of a resolution which had been adopted on the previous day at a special meeting of the board of directors. There were present at this meeting only three of the directors, of whom Wells was one.

J. P. O'Brien, for appellant.

J. B. Curtin, for respondent.

HARRISON, J. [After stating the case, and considering the objection that no sufficient notice of the directors' meeting was given.] The respondent does not, in his brief, present any argument in support of the regularity of this meeting, but contends that, notwithstanding this infirmity, the note and mortgage created an obligation on the defendant, by reason of having been authorized at a meeting at which a majority of the directors were present, and the subsequent ratification thereof by two-thirds of the stockholders.

The respondent relies upon the following provision of section 308 of the Civil Code: "A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." Under his construction of this provision it is immaterial whether Wells abstained from voting, or even voted against the resolution. Such construction would, however, enable an interested director to accomplish by indirection what the policy of the law forbids him from doing. It does not appear, either from the minutes of the board or by any testimony in the case, whether Wells voted for the resolution or not. Although he was director of the corporation, yet he was disqualified from voting, or in any mode acting in his official capacity as a director, for the purpose of creating an obligation of the defendant in his own favor.

1 Statement abridged from opinion. - ED.

(Wickersham v. Crittenden, 93 Cal. 17.) As was said in this case: "So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into"; and in Shakespear v. Smith, 77 Cal. 640, this court said: "In such cases the court will not pause to inquire whether a trustee has acted fairly or unfairly; being interested in the subject-matter, he may not as a trustee deal with himself and thus be subjected to the temptation to advance his own interests."

The same rules which preclude an interested director from uniting with other directors in the creation of an obligation in favor of himself by his vote forbid him from uniting with them in creating such obligation by any act or exercise of his official position, and a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a competent board for the transaction of any corporate business. Section 305 of the Civil Code declares: "Unless a quorum is present and acting, no business performed or act done is valid as against the corporation." The above provision of section 308 must be read in connection with this provision of section 305, and both are limited by the principle that a director shall not participate in any act in which his personal interest is antagonistic to that of the corporation. By reason of the disqualification of Wells from taking any part in passing the resolution for executing the note and mortgage to himself, he could neither vote in favor of the resolution, nor by his presence help to create a quorum by which the other two directors could adopt it. For the purpose of any action upon this resolution he'was as much a stranger to the board as if he had never been elected a director, and, although he may have been physically present in the room with the other two directors, he was not for that purpose a component part of the board, any more than would have been any other bystander, and there was not, therefore, a quorum of the board "present and acting" at the time the resolution was adopted.

In Jones v. Morrison, 31 Minn. 140, it was held that a director of a corporation "cannot properly act on or form part of a quorum to act" on a proposition to increase his compensation. In Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 137, 169, the chancellor said that a member of a corporation contracting with it is regarded, as to that contract, as a stranger; and held that, as the corporation was managed by five directors, one director could not, with two others, constitute a board to vote a mortgage from the company to himself. This case was afterward reversed upon other grounds, but no dissent from this rule was expressed. In Copeland v. Johnson Mfg. Co., 47 Hun, 235, where the corporation was governed by a board of five trustees, it was held that an agreement made by it in favor of its president, under the authority of a vote of himself and two other trustees, was invalid. Under a similar state of facts in Butts v. Wood, 37 N. Y. 317, the court held that the board as thus constituted had no authority

to entertain a bill in favor of one of its members, or to do anything in relation to it; that the claimant was disqualified from acting because he could not deal with himself, "and without him there was no quorum of the directors and they had no authority to transact business." In United States Ice Co. v. Reed, 2 How. Pr. 253, the court said: "A trustee whose attendance is necessary to make a quorum cannot act upon a claim in his own favor to bind the corporation, and by his presence he thus acted." The reasoning of the court in its opinion in Buell v. Buckingham, 16 Iowa, 284,1 cited on behalf of the respondent, does not commend itself to our judgment. In New York it has been held that, where an interested director takes part in the passage of the resolution, the corporate act is vitiated whether his vote was essential to its adoption or not. (Anderton v. Aronson, 3 How. Pr. 216; Ashley v. Kinnan, 2 N. Y. Supp. 574; Metropolitan Elevated Ry. Co. v. Manhattan Ry. Co., 14 Abb. N. C. 103.) A contrary rule seems to prevail in Missouri. (Foster v. Mullanphy Planing Mill Co., 92 Mo. 79.) It is unnecessary, however, in this case to decide which of these rules is correct, inasmuch as, if Wells was not properly a member of the board at this meeting, there was no quorum to act upon the resolution.

After the president and secretary of the corporation had executed the note and mortgage an instrument was signed by the holders and owners of more than two-thirds of the capital stock of the defendant, by which they purported to ratify and approve the said mortgage, and it is contended by the plaintiff that under the provisions of the act of April 23, 1880 (Stats. 1880, p. 131), the mortgage thereby became valid and binding upon the defendant.

Section 1 of that act is as follows: "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation." This section does not confer upon the stockholders any power to mortgage the property of the corporation, or to authorize the directors to mortgage it, and it is a familiar rule that ratification cannot give effect to an unauthorized or invalid act, unless the person or body making the ratification could in the first instance have authorized the act. The corporate power and business of the corporation must be exercised by the board of directors (Civ. Code, sec. 305), and the stockholders cannot, by their own act, mortgage its property. (Gashwiler v. Willis, 33 Cal. 11.2) Any mortgage, to be effective, must be made by the board of directors, but under the provisions of the above act of 1880 the consent of two-thirds of the stockholders is requisite to its validity. The stockholders are thus made a component part of the power to make a mortgage effective, but cannot, by any act of their own, make a mortgage, or validate one that has not been previously authorized and executed by the board of directors.

Whether the defendant would be estopped from contesting the claim of the plaintiff to recover the moneys advanced to it by him is not involved herein. The plaintiff seeks by this action the sale of the defendant's property in payment of the note held by him, but, unless the defendant has created a lien upon the property, the plaintiff cannot maintain the present action for compelling its sale.

The judgment and order denying a new trial are reversed.

Van Dyke, J., and Garoutte, J., concurred.

Hearing in Bank denied.

STEWART v. LEHIGH VALLEY R. CO.

1875. 38 New Jersey Law, 505.1

In the Court of Errors and Appeals, upon error to the Supreme Court.

The Lehigh Valley Railroad Company sued Cornelius Stewart and Joseph C. Stewart, in assumpsit, for tolls upon the passage of boats with merchandise over the Morris Canal. The defendants, in 1868, made a contract under seal with the Morris Canal and Banking Company, whereby it was stipulated (inter alia) that, for a term of five years, the defendants should be allowed a drawback of one half the tolls payable according to the printed rates for certain classes of freight. At the date of this contract one of the defendants was a director of the Morris Canal and Banking Company. In 1871 the Morris Canal and Banking Company leased its canal, appurtenances and franchises to the Lehigh Company, and also assigned to the Lehigh Company its contract with the defendants. If the defendants are allowed the stipulated drawback, nothing is due from them for transportation.

Vanatta, Attorney General, and B. Williamson, for plaintiff. Thos. N. McCarter, for defendants.

DIXON, J. . . . The plaintiff raises another and a most important question touching the validity of this contract, by a second replication to the second plea before mentioned, upon which no issue was joined, because of the judgment of the Supreme Court holding that plea bad. The main fact averred in the replication also appeared in evidence at the trial, and testimony as to some of the outlying circumstances was offered by the defendants, excluded and exception taken. On the argument before this court, the counsel for the plaintiff urged this main fact as necessarily invalidating the contract relied on by the defendants. This fact is, that at the time of the negotiations for, and the execution of, the contract in question, one of the defendants was a director of The Morris Canal and Banking Company — a trustee

1 Only so much of the report is given as relates to a single question. - ED.

for it, to manage its affairs — and it is insisted that his relation to the company was, therefore, such that he was prohibited from entering into this contract with it, and that the contract is, *ipso facto*, void.

The position thus assumed by the plaintiff rests upon the broad principle that it was the duty of the director to so deal with the property and franchises of the corporation — to so manage its affairs as would most conduce to the corporate interest, and that he could not perform that duty while contracting with it in his own behalf, or if by possibility his own interest was consistent with the best interest of the company in so contracting, yet, so insidious are the promptings of selfishness and so great is the danger that it will over-ride duty when brought into conflict with it, that sound policy requires that such contracts should not be enforced or regarded. After an examination of all the cases cited, and such others as I have found, and a careful consideration of the principle and the results of regarding and of disregarding it, I have come to the conviction that the true legal rule is, that such a contract is not void, but voidable, to be avoided at the option of the cestui que trust, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this. A director of a corporation may have rights not arising out of express contract - such as the right to pass over its railroad, or transport his goods over its canal, on paying reasonable tolls, or to have money which he has loaned it repaid to him; but where the right is one which must stand, if at all, upon an express contract, and which does not arise by operation or implication of law, then he shall not hold it against the will of his cestui que trust; for in the very bargain which gave rise to it, in which he should have kept in view the interest of that cestui que trust, there intervened before his eyes the opposing interest of himself. The vice which inheres in the judgment of a judge in his own cause, contaminates the contract; the mind of the director or trustee is the forum in which he and his cestui que trust are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, that judgment must fall. It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence. There may be isolated cases in which the trustee is willing to make a contract on more favorable terms for the cestui que trust than any one else, but the opportunities for self-advancement, at the expense of those whose concerns he has in charge, and under circumstances where concealment is easy, are so much more numerous than these isolated cases, that in declaring a rule the latter are not worthy of consideration. Nor is it proper for one of a board of directors to support his contract with his company, upon the ground that he abstained from participating as director in the negotiations for and final adoption of the bargains by his co-directors; the very words in which he asserts his right declare his wrong; he ought to have participated, and in the interest of the stockholders, and if he did

not, and they have thereby suffered loss, of which they shall be the judges, he must restore the rights he has obtained — he must hold against them no advantage that he has got through neglect of his duty towards them. Many authorities exemplifying the rule may be found. I cite a few only:—

York Building Ass. v. Mackenzie, 8 Bro. P. C., 42 of Appendix — 4 Cr. & Stew. 378; Aberdeen Railway Co. v. Blaikie, 1 Macq. 461; The York & M. N. R. Co. v. Hudson, 16 Beav. 485; Mulford v. Minch, 3 Stockt. 16; Davoue v. Fanning, 2 Johns. Ch. 252; Cumberland Coal & Iron Co. v. Sherman et al., 30 Barb. 553; Gardner v. Ogden et al., 22 N. Y. 327; Butts v. Wood, 37 N. Y. 317; Michoud et al. v. Girod et al., 4 How. 503.

The application of the rule is most frequent in the relations between vendor and purchaser, but its reason and force extend to all agents and trustees, public and private. It has not always presented itself to the minds of judges in its full scope. At times they have been seduced into listening to suggestions that the circumstances of the special case showed the absence of fraud and over-reaching. At other times, they have intimated that the cestui que trust must seek his relief in equity; but the strongest intellects have enunciated the rule with its utmost vigor, and in its broadest extent.

The qualification, however, which the rule undoubtedly has, saves the case before us from its operation. The cestui que trust of the defendant director was not the plaintiff, but the Morris Canal and Banking Company. The right of avoidance was one which belonged to that company and its stockholders, and not to the plaintiff. The act of 1871, empowering the canal company to lease, only authorized it to lease the canal, with its boats, property, works, appurtenances, and franchises; and under this power, it could scarcely transfer so peculiarly personal a privilege as this option to avoid a contract. Nor would a transfer of the contract, and all of the canal company's rights under it, carry this right of choice; for that does not spring out of the contract, but out of the fiduciary relation existing between the parties at the time the contract was made. And, moreover, the case shows that, after the lease to the plaintiff, and during all the time in which it is claimed the tolls sued for were accruing, the plaintiff dealt with the defendants on the basis of the binding efficacy of the contract.

I conclude, therefore, that there appears before us no reason for refusing to give to this contract that force to which our construction of its terms entitles it, and that, upon the case before us, judgment should be rendered for the defendants below, the plaintiffs in error.

For affirmance — REED, WOODHULL — 2.

For reversal — The Chancellor, Dixon, Knapp, Clement, Dodd, Green, Lathrop, Wales — 8.1

¹ Compare Dillon, J., in Buell v. Buckingham, A. D. 1864, 16 Iowa, 284, pp. 293-296.
In Burden v. Burden, A. D. 1896, 8 New York Appellate Division, 160, pp. 171-174, it is

JUNKINS v. UNION SCHOOL DISTRICT.

1855. 39 Maine, 220.1

Assumpsit on account annexed. At a meeting of the school district it was voted to erect a school-house and to raise money for that purpose. At the same meeting the plaintiff and two other persons were chosen a committee to superintend the erection of the schoolhouse and the laying out and expending the money raised by the district. The committee employed the plaintiff to do certain work in connection with the building of the school-house.

The case was submitted to the full court upon report from Nisi Prius.

N. D. Appleton, for defendant.

Eastman and Leland, for plaintiff.

Shepley, C. J. . . . It is insisted that the committee could not lawfully employ one of its own members to do such work; that the trust was a personal one to be performed by all.

A majority of a committee so composed is authorized by statute to act. Ch. 1, § 3, art. 3. A majority having such authority to do what all its members might, constitutes a party capable of employing; and one of the members of the committee, not acting as such, but as an individual, constitutes another party capable of contracting or of being employed. In such case the contract is not made or the person employed by a committee attempting to make a contract or incur a liability with itself.

A committee might thus act corruptly and fraudulently, by two different members making contracts with each of the others, so that each should have a contract in the performance of the work entrusted to all. In such case their contracts would be set aside. There is in this case no proof authorizing an inference that there has been fraudulent or corrupt dealing.

"held, that a contract between two corporations having one or more common directors (if not disapproved by a majority of the stockholders) will not be avoided at the suit of a minority stockholder, unless the contract were fraudulent and injurious to the corporate property. The court say that the contract may be voidable at the election of the corporation. But the minority stockholders "are not entitled to make such election in behalf of the corporation." See, however, note to Farmers' Loan and Trust Co. v. New York and Northern R. Co., in a subsequent chapter. — ED.

¹ Only so much of the report is given as bears on a single point. Argument omitted. - ED.

JANNEY v. MINNEAPOLIS INDUSTRIAL EXPOSITION et al.

1900. 79 Minnesota, 488.1

APPEAL from District Court for Hennepin County, where the case was tried before Simpson, J.; who found in favor of plaintiffs, and denied a motion for a new trial.

Plaintiffs were directors and creditors of the defendant corporation. One question in their litigation with other stockholders who were made defendants grew out of the purchase of corporate property by plaintiffs at an assignee's sale.

The facts found by the trial court are in part as follows: -

The corporation, having become insolvent, made an assignment for the benefit of creditors. The assignee was ordered by the court to advertise for bids for the corporate property, or any part thereof. But no sale was thus effected, except that of two lots of land. Subsequently, by order of the court, the assignee was authorized to advertise and sell the remaining property so assigned at public vendue to the highest bidder. At such sale there was no bidder except the plaintiff Janney, acting for himself and other creditors (now co-plaintiffs). Janney, in order to protect his own interests and that of the other plaintiffs, did, in good faith, bid for the property the sum of \$25,100. The assignee reported the sale to the court, and, after a hearing therein, it was duly confirmed, and the assignee ordered to convey to Janney, which was done; he paying the assignee in cash \$25,100. The sale was fairly and lawfully conducted, and the amount realized was the highest sum which the assignee was able to obtain for the property. The property so sold to the plaintiffs was, according to the expert testimony, then worth the sum of \$100,000.

The trial court did not find that if a resale of the property was ordered it would bring an increased price, or that there was any reasonable probability that such would be the case, other than may be inferred, if at all, from the value of the property as found by the court.

The defendant stockholders, in their answer, objected to the sale; and asked that the plaintiffs be charged with, and be required to account for, the difference between the purchase price paid by the plaintiffs for the property and its value. Their answer also prayed for general relief.

Hale & Montgomery, for appellants.

Hahn, Belden & Hawley, for respondents.

START, C. J. . . . The appellants further claim that, even if it be conceded that plaintiffs may enforce the stockholders' liability for the payment of their debts against the corporation, still the trial court

¹ Statement abridged from opinion. Arguments omitted. Only so much of the opinion is given as relates to a single question. — ED.

erred in its conclusions of law, for the reason that the court, upon the facts found, ought to have ordered a resale of the property at an upward bid above the amount paid by the plaintiffs, or applied protanto upon their debts against the corporation the difference between the amount they paid for the property and its value as found by the court. This conclusion rests upon the assumption that in purchasing the property at the assignee's sale, pursuant to the order of the court, the plaintiffs violated their duties as directors. If the premises are correct, the conclusion would seem to follow that the stockholders are entitled to some relief if not guilty of laches. But are the premises correct? This question must be answered from a consideration of the special facts of this case with reference to the general principles of law applicable to the rights, duties, and disabilities of directors of a corporation.

The relation between a corporation and its directors is that of principal and managing agents. They are not trustees in the sense of holding the legal title to any of its property for its benefit, or that of its stockholders or its creditors. Still, the relation is essentially a fiduciary one, and upon sound principles of public policy directors are inhibited, as a general rule, from purchasing for their own benefit the property of the corporation, very much as a trustee is disqualified from purchasing for his own advantage the property of his cestui que trust. This proposition, upon principle and authority, is unquestionably the law. Beach v. Miller, 130 Ill. 162, 17 Am. St. Rep. 291, 298, notes; 3 Thompson, Corp. § 4071; 2 Cook, Stockh. § 653. It is, however, equally clear upon principle that where the legal title and control of all of the property of a corporation is vested in an assignee or receiver, in trust for the benefit of its creditors, and the court orders the property sold for the purposes of the trust, a directorcreditor, having interests to protect, may in good faith purchase the property at such sale, and acquire thereby the absolute title thereto. Especially is this so where there are other active directors, and the sale is made subject to confirmation by the court, and is approved by it. But in all such cases the director must act in the utmost good faith, for the transaction will be jealously scrutinized. 1 Morawetz, Priv. Corp. § 527; 3 Thompson, Corp. §§ 4068, 4074; Barber v. Bowen, 47 Minn. 118, 49 N. W. 684; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Appeal of Lusk, 108 Pa. St. 152.

The facts of this case bring it within the exception to the general rule that directors cannot purchase the property of the corporation for their own benefit. The title, possession, and control of the property were in the hands of an officer of the court (the assignee), and had been for nearly a year prior to the sale. The sale was made by direction of the court, and subject to its confirmation. The plaintiffs had no control over the property or the assignee, who was the representative of the corporation, its creditors, and its stockholders. They had no power to prevent or control the sale, which was a judi-

cial one, brought about by the court through its officer. They had material interests to protect by bidding at the sale. They purchased in good faith, at the best price obtainable. The appellants had notice of the sale, and did not object thereto until long afterwards. See Pinkus v. Minneapolis Linen Mills, 65 Minn. 40, 67 N. W. 643. The sale was fairly conducted, and was confirmed by the court. There were twenty-one directors at the time besides the plaintiffs. These facts justify the conclusion of the trial court to the effect that the plaintiffs, in purchasing the property to protect their own interests, did not violate their duties to the corporation. The facts found by the court justify its conclusions of law.

Order affirmed.

CAMPBELL'S CASE.

In re COMPAGNIE GENERALE DE BELLEGARDE.

1876. Law Reports, 4 Chancery Division, 470.1

By the articles of association of the Compagnie Générale De Bellegarde, Limited, the directors were authorized to borrow; the repayment to be secured by mortgage, or by debentures, or in such other manner as the directors might think expedient. In 1872 the directors resolved to borrow £90,000 by mortgage obligations, and issued a prospectus offering mortgage certificates at par. Finding that they were unable to place the debentures at par, the directors proceeded to issue bonds to the public at £92, 10s. per cent. Of the bonds so issued, a director named Campbell took one set of the nominal value of £1320, for which he paid £1221, being at the rate of 92 1-2 per cent., and also another set of the nominal value of £680, for which he paid £629, being at the same rate. In the company's books Campbell was credited with payment of the two sums of £1320 and £680 in full; and was debited with the two sums of £99 and £51, under the entry, "Commission on mortgage obligations."

The company having been, on Jan. 15, 1876, ordered to be wound up, the official liquidator now took out a summons that Campbell might be ordered to pay the two sums of £99 and £51.

It appeared that all the bonds were issued at £92, 10s. per cent., except two lots of the aggregate amount of £340, which were issued without any discount.

Sir H. Jackson, Q. C., and Terrell, for the official liquidator.

Kay, Q. C., and W. Renshaw, for Campbell.

BACON, V. C. This case, in one point of view, is of importance, because it has been argued as if it fell within the principle which the Courts of Equity have always adhered to, not to permit an agent, or

1 Statement abridged. Arguments and part of opinion omitted. - ED.

director, or any person in a fiduciary character, and having power and influence in the concern, to make a profit by his dealings with the concern.

But the fact that any profit was made I find to be wholly wanting in this case. There was no profit. The directors publish a prospectus, in which they say, "We are going to issue bonds at par." It is all very well to say so, but when they come to issue these bonds, people will not take them at par. What are they to do? They find they cannot place them at par, and they sell them on the best terms they can, and, except in the two particular cases mentioned, they issue all these debentures on the same terms as those on which the debentures taken by Mr. Campbell were issued. What is there unlawful in that? What is there to prevent the directors buying on the same terms as other people? The case, when examined, does not fall within the principle upon which the application is made. The section of the Companies Act which has been referred to is really wide of the present case. That section compels restitution from directors when they shall have misapplied or retained in their own hands, or become liable or accountable for, any moneys of the company. But, in this instance, when did the difference between par and 92 1-2 per cent. ever become the money of the company? It was money which they never received, and which was never theirs. The section proceeds, "or has been guilty of any misfeasance or breach of trust in relation to the company." What misfeasance or breach of trust was Mr. Campbell guilty of in advancing to the company, on exactly the same terms as everybody else, money which they were in want of? It was not money for which he had become liable or accountable. The company's books have been kept, as it appears to me, in the proper and regular way. It is necessary for book-keeping purposes, that there should be entered on the credit side of the ledger the aggregate amount of all the debentures representing the debt due from the company. Then the company debit the amount unpaid, and whether that amount be called commission or discount, the true nature of the transaction cannot be obscured. The directors did that which it was lawful for them to do - they issued debentures at a certain discount. / Mr. Campbell took them as other people took them, and paid his money for them. He derived no sort of profit from them; the advantage, if any, was all on the side of the company.

[Remainder of opinion omitted.]

Summons dismissed.

SEYMOUR v. SPRING &c. ASSOCIATION.

1895. 144 New York, 333.1

FINCH, J. . . . But the further claim is made that, because Hotchkiss and Seymour were officers of the corporation, holding a fiduciary relation as trustees or directors, they could not lawfully buy the valid and outstanding obligations of the company at less than par and enforce them for the full amount against the debtors. If that be sound doctrine, as is stoutly maintained, if directors cannot in any case invest in the bonds of their own companies except at the peril of a constructive fraud, if they cannot safely buy such bonds below par, because they deem them unduly depressed, if titles to corporate obligations passing through their hands become tainted by their touch, it is quite time that the courts should give, what they have not given, a very definite and distinct warning. Some citations of seeming authority are pressed upon us and others exist. The broad rule is stated in Perry on Trusts (§ 428), that "a trustee, executor or assignee cannot buy up a debt or incumbrance to which the trust estate is liable for less than is actually due thereon, and make a profit to himself," and that is the doctrine invoked in this case as applicable to a director regarded as a trustee of the corporation. But the statement, however correct in its application to specific instances, must be taken with the limitations which belong to it. Its foundation is that a fiduciary agent, owing a duty to his principal, cannot make a contract for his own benefit which is or may be inconsistent with that duty, and the cases generally are of two kinds. (The trustee buys in the property of his principal at a sacrifice for his own benefit, when, if he bought it at all, it was his duty to do it for his principal, or he makes a contract in behalf of his principal with himself directly or indirectly as the other party to the agreement.) The first class of cases is illustrated by Slade v. Van Vechten (11 Paige, 26), where the assignee bought in assigned property at a sheriff's sale and claimed the personal benefit of his bargain; and the second class by Munson v. S. G. & C. R. R. Co. (103 N. Y. 58), in which the directors contracting had a private and personal interest, possibly adverse to their fiduciary duty. Almost, if not quite all, of the cases cited by the learned counsel for the appellant belong to one or the other of these two classes. But they do not decide this case, for Hotchkiss and Seymour neither bought in any property of the company nor dealt with the corporation in any respect. They made their contract, not with it, but with third persons capable of protecting their own rights, and bought nothing which the corporation owned or to which it had a right. We must go to still other cases, founded it may be to some extent upon similar ideas of fiduciary duty, to discover even an ap-

¹ Statement and arguments omitted. Only part of the opinion is given. - ED.

proximate authority. There are cases of co-partnership in which the general rules pertaining to that specific relation might prove to be broad enough to cover the purchase of the debt owing by the firm (Am. Bk. Note Co. v. Edson, 56 Barb. 89), and other cases in which the duties flowing from a liquidation conducted by the trustee, and as to which he owes a specific trust duty, forbid a purchase by the trustee for his own benefit at a discount. But in every class of cases the rule is founded upon the unwillingness of the law to uphold contracts which bring into collision the trust duty and the personal interest, and it is because of that collision, and the temptations which surround it, that it declares the contract voidable at the election of the beneficiary without investigating the good or bad faith of the trustee. The entire basis of the rule consists in this collision between trust duty and personal interest, and the equitable prohibition has no application where there is no such possible inconsistency) There is no such conflict in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations. There is no present duty resting upon him to extinguish them. The time for that has not come, the duty has not arisen, may never arise, the corporation is not prepared to pay, does not contemplate paying, but intends and expects to await the full maturity of the debt. Unless some special fund has been provided, or some special liquidation has been ordered, the director owes no duty to his company to discharge or buy in the outstanding bonds, and may purchase for himself because no inconsistent trust duty has arisen. Why should he not? (While the bonds are running to their maturity, and the corporation is not able to extinguish them, is not bound to do so, does not even wish or seek to do so, what does it matter who holds the securities or on what terms they pass from hand to hand? It seems to me that we are asked to crowd the rule almost to the verge of an absurdity, and to inflict a vital injury upon business interests by tainting with invalidity the holding by a director of the unmatured obligations of the corporation bought by him in the open market and not put in liquidation or sought to be extinguished. There must at least be some fact or circumstance which charges the trustee with a present duty to act for his company in respect to the bonds, which duty is or may be inconsistent with a personal purchase. No such duty rested upon Hotchkiss and Seymour, and they had a right to buy and hold for their own benefit.

Indeed, there is a further and equally conclusive answer. If the doctrine invoked applied to this case it would make the purchase not void but voidable at the election of the corporation, and that election must be made promptly and upon sufficient knowledge of the facts. The beneficiary cannot wait and speculate upon the chances of delay, but must act. Here the purchase was made before 1873, and in 1880 the corporation is found recognizing and ratifying the title of the vendees or their successors, making payments to them, and providing for future payments, and it is only after a delay of fifteen years that an attempt to repudiate the purchase is made.

CHAPTER XI.

VOTING RIGHTS OF STOCKHOLDERS.

"IT seems that, at common law, each shareholder is entitled to cast but one vote, irrespective of the number of shares which he holds; but there are good reasons for holding that this rule has no application to ordinary joint-stock business corporations at the present day. The custom of giving the shareholders in such companies a vote for every share has become so well established, that it is fair to imply an intention to follow this custom in the absence of any indication to the contrary. It is generally provided by statute [a general law applicable to all private business corporations], or by express provision in the articles of association of a corporation, that the shareholders shall be entitled to a vote on account of each share." Morawetz on Private Corporations, 2d ed. s. 476α.

COMMONWEALTH v. BRINGHURST.

1883. 103 Pa. State, 134.1

Error to Court of Common Pleas, No. 2, of Philadelphia County. Quo warranto by the Commonwealth of Pennsylvania, ex relatione John P. Verree et als., against Bringhurst et als. to determine the right of the defendants to hold the office of directors of the Philadelphia Iron & Steel Company, a corporation chartered by special Act of April 12, 1867 (P. L. 1211).

The suggestion of the relators set forth, in substance, that at the annual meeting certain votes by proxy were received by the inspectors of election under protest; that the inspectors refused to count any of the votes thus given by proxy; that the defendants, who had received a majority of the votes given by stockholders in person, were declared elected directors; whereas if the votes given by proxy had been counted together with the votes given in person the relators were elected.

Defendants demurred.

The court below sustained the demurrer and entered judgment for defendants.

¹ Statement abridged. Part of argument omitted. - ED.

R. C. Dale and Samuel Dickson for plaintiffs in error. The rule of the common law, established when municipal, religious, and charitable corporations were alone known, has no application to trading or monied corporations where the relation of the members is not personal. In the former, the units are persons, in the latter the units are shares. State v. Tudor, 5 Day, 329. The case of Taylor v. Griswold (2 Green, N. J. 223) manifests a narrow adherence to common-law doctrines, and the other cases cited on the other side are not authorities. Philips v. Wickham (1 Paige, 590, 598) was the case of a quasi municipal corporation. Brown v. Commonwealth (3 Grant, 209) was decided on un express limitation in the charter, and Craig v. Church (7 Norris, 42) was the case of a religious society. An examination of the general legislation of this State shows that the legislature regarded the right of shareholders to vote by proxy as an inherent right without special enactment [citing various Acts]. In all business transactions what one does by another he does himself, and what he can do himself he can do by another. Story on Agency, § 3. If a vote cannot be given by proxy, the Guarantee Trust Company, which is the largest holder of this stock, is disfranchised, for a corporation can only act through an

George R. Van Dusen and W. Heyward Drayton, for defendants in error.

[Argument omitted.]

Mercur, C. J. The relators are stockholders of the Philadelphia Iron and Steel Company. It was incorporated by special Act of 12th of April, 1867.

The contention is, whether the stockholders may vote by proxy, in the annual election of officers of the corporation?

Section 2 of the Act declares "the affairs of said company shall be managed by a board of five directors, one of whom shall be the president, who shall be chosen by the stockholders. All elections shall be by ballot, and every share of stock upon which the required instalments have been paid, shall entitle the holder thereof to one vote." Section 3, inter alia, authorizes the corporation to "make all needful rules, regulations, and by-laws for the well ordering and proper conduct of the business and affairs of the corporation. Provided the same in no wise conflict with the constitution and laws of this State or of the United States."

The charter in no wise refers to voting by proxy. No by-law has been adopted authorizing the stockholders to so vote.

In the absence of any express authority in the charter, and without any by-law authorizing it, the question is whether the stockholders may vote by proxy. In other words, is it a power necessarily incident to the corporate rights of the stockholders?

A corporation is the mere creature of the law. It cannot exercise any power or authority other than those expressly given by its charter, or those necessarily incident to the power and authority thus granted,

and therefore, in estimation of law, part of the same. Wolf v. Goddard, 9 Watts, 550; Diligent Fire Co. v. Commonwealth, 25 P. F. Smith, 291.

The right of voting at an election of an incorporated company by proxy is not a general right. The party who claims it must show a special authority for that purpose. Angell & Ames on Corporations, § 128; Philips v. Wickham, 1 Paige's Cases in Chancery, 590. In this case, Chancellor Walworth says, the only case in which it is allowable at the common law is by the peers of England, and that is said to be in virtue of a special permission of the King. He adds: "It is possible that it might be delegated in some cases by by-laws of a corporation, where express authority was given to make such by-laws, regulating the manner of voting." In the People v. Twaddell, 18 Hun, 427, it was held, a stockholder cannot so vote unless expressly authorized by the charter or by-laws. Taylor v. Griswold, 2 Green (N. J.) 222, holds that a right of voting by proxy is not essential to the attainment and design of a charter, and even a general clause therein authorizing the company to make by-laws for its government was insufficient of itself to give that right. In State v. Tudor, 5 Day (Conn.) 329, there was no clause in the charter authorizing the stockholders to vote by proxy; yet the company made a by-law authorizing them to so vote. The validity of this by-law was sustained by a majority of the court. So in People v. Crossley, 69 Ill. 195, effect was given to a by-law of the corporation, authorizing voting by proxy, the by-law not being in conflict with the Constitution and laws of the State.

That a right to vote by proxy is not a common-law right, and therefore not necessarily incident to the shareholders in a corporation, appears to have been recognized in *Brown* v. *Commonwealth*, 3 Grant, 209, and in *Craig* v. *First Presbyterian Church*, 7 Norris, 42.

The selection of officers to manage the affairs of this corporation requires the exercise of judgment and discretion. They must be elected by ballot. The fact that it is a business corporation in no wise dispenses with the obligation of all the members to assemble together, unless otherwise provided, for the exercise of a right to participate in the election of their officers. Although it be designated as a private corporation, yet it acquired its rights from legislative power, and it must transact its business in subordination to that power. As then the relators cannot point to any language in the charter expressly giving a right to vote by proxy, and it is not authorized by any by-law, they have no foundation on which to rest their claim. Judgment was correctly entered for the defendants on the demurrer.

Judgment affirmed.

STONE, C. J., IN MACK v. DEBARDELEBEN COAL AND IRON CO.

1890. 90 Alabama, 396, pp. 401-404.

Many other questions material to the future government of the Eureka Company have been well and ably argued, and we feel it our duty to notice some of the more important of them. In the act to amend the charter of said company, approved December 6, 1873 — Sess. Acts, 139 — is this language: "No stock [holder], either in his own right, or as proxy or agent for others, shall be entitled to cast more than one-fourth of all the votes at any election of directors." This clause is set forth in the amended bill, and is in that way brought before us. We hold this language means one-fourth of all the votes the shares of stock authorize to be cast. One-fourth of the votes in the Eureka Company, with its present number of shares, is 2,077.

It is averred, and not denied, that the DeBardeleben Company, as a corporation, is the owner of more than 4,600 of the Eureka shares. The amended bill charges that "the defendant, H. F. DeBardeleben, as president of the DeBardeleben Coal and Iron Company, and acting as president of Eureka Company, and David Roberts, as secretary of both of said companies, and with the knowledge and consent and connivance of the defendant A. T. Smythe, a short time prior to the 19th of January, 1890, had a large lot of the stock of the Eureka Company, . . . which was owned and held by the DeBardeleben Coal and Iron Company, . . . transferred into their individual names, that is to say: they had transferred to each of the following persons, who were at that time directors of the DeBardeleben Company, or large stockholders in said company, the following number of shares: H. F. DeBardeleben, 500 shares; David Roberts, 500 shares; A. T. Smythe, 360 shares; M. B. Lopaz, 423 shares; Robert Adger, 300 shares; A. M. Adger, 300 shares; F. J. Pelzer, 300 shares; leaving in the name of the DeBardeleben Coal and Iron Company 1,990 of the 4,623 shares: . . . that the said stock so transferred . . . was, and is now, the stock and property of the DeBardeleben Coal and Iron Company; . . . that the transfers to said persons were so made . . . for the purpose of avoiding and getting around the section of the charter and by-laws of said Eureka above set out. Said transfers of said stock were so made in fraud of the minority stockholders of said Eureka Company, and to enable all of said stock to be voted in the interest, and for the benefit of the DeBardeleben Coal and Iron Company." The substantial averments of fact in the foregoing extract are not denied in the answers.

It is contended for appellees that the said transferrees of the DeBardeleben Company's stock in the Eureka Company are of right entitled to vote the several shares standing in their names, notwithstanding the statutory inhibition copied above. They rely on the following authori-

ties as supporting their contention: In re Stranton I. & S. Co., 16 Eq. Ca. L. R. 559; Pender v. Lushington, 6 Ch. Div. L. R. 70; Moffatt v. Farquhar, 7 Ch. Div. L. R. 591; Camden & Atl. R. R. Co. v. Elkins, 37 N. J. Eq. 273. The English authorities quoted do lend some countenance to their argument, but we can not follow them. The New Jersey case is not fully in point. We think the statutory restraint on the voting power of the stockholders was enacted for very wise and conservative purposes, and that it should be upheld in its integrity. It is perhaps to be lamented that our organic law does not contain a provision applicable to all business corporations aggregate, that no one person, whether natural or artificial, can ever exercise a controlling voice in their organization or government.

Giving due consideration to the sworn denials and averments of the answers in this case, we find no ground for imputing vicious purposes in the government of the Eureka Company; but the power one corporation acquires by the ownership of a majority of the stock of another corporation, with which it has business connections, opens an inviting door for very pernicious possibilities, which the virtues of the manipulators and speculators have not always enabled them to withstand. The provision we are considering was conceived in the interest, and for the protection of minority stockholders, and deserves to be upheld with a strong hand. The highest function of the law is the protection of the weak against the mighty.

On principle, it would seem that the restrictive clause in the amended charter of the Eureka Company is too pronounced and emphatic to be disobeyed, or evaded. What can not be done directly, can not be accomplished by indirection. No one, except in matters of official trust, can confer on another authority to do what he can not do himself. What one does by another, he does by himself. But we are not without authorities in support of our views. Campbell v. Poultney, 6 Gill & Johnson, 94, presented the identical question we have in hand. The question arose on a bill filed to prevent gratuitous transferrees of stock. made that the stock might be voted in the interest of the transferror. who still remained the owner, from voting such stock as an indepen-The court ruled that the transferror could not dent stockholder. increase his voting power by any such device, and chancery would enjoin the casting of a greater number of votes than the transferror himself could have cast. In Webb v. Ridgely, 38 Md. 364, the same doctrine was asserted. - 2 High on Injunctions, § 1231. In State ex rel. Danforth v. Hunton, 28 Ver. 594, a proceeding by quo warranto to test the question of the election of certain persons as directors of a bank, similar principles were declared. It was ruled that, when the transferror could not vote the stock, his gratuitous transfer to another. that the latter might vote it in his interest, and according to his wishes, conferred on that other no greater power than he himself could exercise. The court, among other things, said, "The law is not to be outwitted by cunning devices."

Our conclusions are, that neither the DeBardeleben Company nor any other stockholder of the Eureka Company, can, either directly or indirectly, vote more than one-fourth of all the votes at any election of directors; that in a proper case chancery will enjoin that company from casting more than one-fourth of the votes; that if, by reason of votes cast in excess of this restriction, any person or persons are declared elected directors, on a proceeding in quo varranto the illegal votes will be disallowed; and if such disallowance reduces the number of votes cast for such director or directors below a majority of the votes lawfully cast, then a judgment shall be awarded against them, removing them from said office or trust.

VANDERBILT v. BENNETT.

1889. 6 Pa. County Court Reports, 193.1

BILL IN EQUITY. Exceptions to master's report, C. P. No. 1, Allegheny County.

The bill was filed by Cornelius Vanderbilt against Bennett et als., to restrain defendant from exercising the voting power incident to 2,000 shares of stock in the Pittsburgh & Lake Erie R. R. Co., owned by plaintiff; and to restrain them from interfering with plaintiff in the exercise of his rights of ownership thereof. Defendant filed an answer. The cause was referred to C. S. Fetterman, Esq., as master, whose findings of fact were, in part, as follows:

October 20, 1877, an agreement in writing was entered into by various stockholders of the railroad company, including William H. Vanderbilt, who then owned 2,000 shares. By this agreement all the shares of the subscribers were to be registered in the names of trustees, and these trustees and their successors were to have perpetual power to vote upon the same; and were to vote with a view to carry out certain objects and policies defined in the agreement. Certificates were to be issued, and were issued, to Vanderbilt and other subscribers giving them all the rights of stockholders except the right to vote upon the stock, and reciting that the perpetual power of voting is vested in the trustees.

At the death of William H. Vanderbilt, in 1886, the 2,000 shares became vested in Cornelius Vanderbilt, whose right to vote upon the same was denied at the annual election in 1887.

No consideration passed between the subscribers to the trust agreement or between them and the trustees; and the defendants, who were the trustees at the time suit was brought, claimed no interest in the stock covered by the agreement, except the right to vote it.

The Act of Assembly of Pennsylvania, of February 19, 1849, to

Statement abridged. — ED.

which the Pittsburgh & Lake Erie R. R. Co. was subject, provides, that at all general meetings or elections by the stockholders, each share of stock shall entitle the holder thereof to one vote; and that no proxy shall be received, unless the same shall have been executed within the three months preceding such election or general meeting.

The master's conclusions of law were:

1st. That the trust agreement is invalid as creating an unlawful combination and against public policy.

2d. That if the said agreement is such as can be legally sustained, it is simply a power of attorney or proxy, and revocable at the option of any party to it.

The master's opinion on the second point is, in part, as follows:

Ordinarily the authority of an agent is subordinate to that of his principal. Whether the agency be created by parol, or by writing under seal, unless it be coupled with an interest in the agent in the property, which would be detrimental to him should a revocation be attempted before the objects of the said letter of attorney or trust whatever it may be -- be accomplished, the agency is revocable at any time by the principal or by the death of the principal. We have in this case an agency created, and, as stated by the paper itself, a perpetual agency, in a certain body of men designated as trustees, for the purpose of voting and controlling the stock of the parties subscribing to the paper hereinbefore referred to, without any other or further duty to be performed in regard to the stock, excepting as specified in said paper. The trustees themselves have no interest whatever, financial or otherwise, in it, and no right to control the transfer or disposition thereof in any wise whatsoever. The trust raised by the said paper, if any, is simply and purely a dry trust, if we may so call it, leaving or giving no functions whatever for the trustees to perform, except the simple voting of the stock subscribed in said paper and in accordance with the vote they may cast to control the organization and policy of the said company. It is common sense and common law that the power or authority of the agent cannot be greater than that delegated to him by his principal.

[After quoting from Griffith v. Jewett, Superior Court of Cincinnati, 15 Weekly Law Bulletin, 119, and Hafer v. Jewett, 14 Weekly Law Bulletin, 68, the master proceeds:]

Every proxy, although by its terms irrevocable, is revocable unless coupled with an interest. Story on Agency, s. 476.

The principal may revoke the authority of his agent at his mere pleasure if the agent has no interest in its execution, and there is no valid consideration for it. It is treated as a mere nude pact and is deemed in law to be revocable upon the general principle that he alone who has an interest in the execution of an act is also entitled to control it. Blackstone v. Buttermore, 53 Pa. 266; Hartley & Minor's Ap., 53 Pa. 212; also see Walker v. Dennison, 86 Illinois, 142; McGregor v. Gardner, 14 Iowa, 340; Hunt v. Rousmanier, 8 Wheaton, 201.

To constitute a power coupled with an interest, the interest must be in the subject-matter on which the power is to operate, and not in the mere results of its execution. Hartley & Minor's Ap., supra.

There is no consideration whatever between the trustees and the subscribers; none is claimed or mentioned in the agreement itself, and as between the subscribers themselves, there is also none. The mere fact that several or a majority have signed does not furnish a supporting consideration. 16 Ohio, 27; 41 Ohio, 527; 131 Mass. 528.

No one subscriber acquired under the agreement any interest in any other one stock or an undivided interest in the whole of the stock represented by the subscribers. No real and special consideration is claimed, and without this the agreement cannot be supported. An agreement of shareholders not to sell, pledge or give proxy for their shares, except by concurrent consent, is void without such consideration. Fisher v. Bush, 35 Hun (N. Y.), 641.

The entire beneficial interest in the stock is severally vested in the subscriber, the voting power in the trustees, and does not differ materially from what it would be if the stockholders retaining their shares had simply united in a proxy authorizing the trustees to cast the vote of all of them. Griffith v. Jewett, supra.

The master is, therefore, of opinion, that said paper called a deed of trust, if valid, is in effect nothing more than a power of attorney, or proxy, given for the purpose of carrying out the designs of the parties therein mentioned, and as such, revocable at the pleasure of any party to it. And under all the facts of the case the complainant is entitled to relief, and [the master] would recommend a decree therefor as prayed for in the said bill of complaint.

To this report the defendants excepted.

George Shiras, Jr., Jarvis M. Adams, and Stevenson Butler, for the exceptions.

John Dalzell, and Knox & Reed, contra.

Stowe, P. J. The questions involved in this controversy are of the gravest character, and should have had a more deliberate and careful consideration, both by the master and the court, than either have had time to bestow upon it. The former has had four or five days to prepare his report, and the latter one day to consider the exceptions. It is hoped that this will be sufficient apology for any short-comings in the one and the want of an extended opinion by the other sustaining the views entertained by the court in this matter. We think that the trust agreement in question is absolutely void as contrary to public policy, and because it substantially amounts to a repeal of our Act of Assembly in regard to the right to vote incident to the ownership of railroad stock. But whether this be so or not, which, as the case stands, is not judicially before us for our determination, we are of the opinion that it is at least revocable by the plaintiff, and has been duly revoked so far as his stock is concerned, and, therefore, the exceptions to the master's report are now overruled, and decree in accordance berewith pro ut.

But we are also of opinion that under the circumstances of this case the plaintiff should pay the costs of this proceeding.

Note. An appeal to the Supreme Court from the decree entered in accordance with this opinion was non prossed at October Term, 1888, it being understood that the parties had agreed upon a settlement.

ROBINSON, J., IN SHEPAUG VOTING TRUST CASES.

1890. 60 Conn. (Supplement), 553, pp. 578-581.

It seems to the court that the surrender by a stockholder of his power and right to vote on his stock for the term of five years is contrary to the policy of the law of this state. Were this a power of attorney in formal terms, no claim would be made but that it was not only contrary to the policy of the law of this state, but in direct conflict with our statute, which says that "no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting; and no such power shall be used at more than one annual meeting of such corporation." Gen. Statutes, § 1927. This statute tends to disclose what the policy of the law of this state is, touching the matter of the surrender by a stockholder of his voting power to some one else. It would seem that it is opposed to such surrender for an indefinite period or for a period of five years. Evidently it was thought a longer surrender of the voting power would result disastrously in many ways.

It cannot be denied that as much disaster might follow to the business and the finances of a corporation and the interest of stockholders, where the voting power is yielded up in a five years voting trust, as by a five years power of attorney. The difference between an irrevocable power and a power irrevocable for five years, is a difference in degree and not in principle. A five year voting power, irrevocable for that time, would furnish time enough and opportunity enough to realize all the evils which our one year statute is manifestly intended to guard against.

It is the policy of our law that an untrammeled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates, is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to

dividends, and perhaps the right to cast the vote directed, willing of unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will, in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation.

And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow-stockholder, to so use such power and means as the law and his ownership of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as is possible. This I take it is the duty that one stockholder in a corporation owes to his fellow-stockholder; and he cannot be allowed to disburden himself of it in this way. He may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform hisduty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow-stockholders. For these reasons I hold that this trust agreement is void as against the policy of the law of this state.

And why is not the voting power surrendered in this trust agreement the equivalent of a power of attorney, and why has not the right of this Trust Company and this committee to control and cast the vote upon this stock, if at any time they had any legal right to exercise it, ceased to exist? It is now more than one year since the voting power was executed, and that power has been used already at one annual meeting. Why is not this voting power in this trust agreement, and the attempt of this trustee and this committee to exercise it now, a disobedience of our one year statute above quoted?

It is claimed that it is not a power of attorney because the Trust Company holds the legal title to the stock. It is said that the right to vote on the stock is not dissociated from the legal title to the stock in this instance. But does this reply quite answer the objections created by the facts in the case, and is it quite true that the voting power here is not dissociated from the legal title? An examination of the trust agreement discloses that the Trust Company is a mere agent, with no beneficial interest in the stock. It holds the title, but the real owner is somebody else. The Trust Company is simply the hand to cast such

ballot as this committee directs. The committee is also but an agent, but without the legal title to the stock or any title to it. It is the head, and the Trust Company is the hand; simply that. The committee direct, control, and select what vote shall be cast, and are the agents and attorneys to perform this very essential part of the act of voting.

The trust company is one of the parties to the trust agreement, and it holds the legal title to the stock, and as such holder of the legal title it has in this trust agreement surrendered all a voter's power except the mere manual act of casting the selected ballot. It has in this trust agreement in effect surrendered to this committee the power to select the ballot. It has conceded to this committee the power to demand that it shall vote as they direct. What remains then in this trustee of the voting power, beyond being the mere hand, the use of which this committee is given the right to demand for this purpose at any stockholders' meeting? Is not the full voting power to all intents and purposes in this committee, and is it not so by delegation? It seems to me that the voting power in this trust agreement falls within the spirit and intent of the prohibition of our statute heretofore referred to, and is terminated by lapse of time and the use of it already at one annual meeting.

It is insisted that there is nothing illegal, per se, in the pooling of stock to carry out a scheme of extension authorized by law and favored by the corporation. This may be true under proper limitations, and when this is all there is to the scheme; but when underlying that pooling contract there is between the members of the syndicate, who are directors or a majority of the directors of the corporation, a secret agreement which enters into this pooling contract, and forms the object of its creation, and by which they are to take to themselves the profits arising from such extension, or from the contracts which they as directors make, elements of unfairness and opportunity for fraudulent and dishonest practices are introduced, which the court cannot too severely condemn. Such a pooling contract or voting trust is in violation of the most elementary principles of law governing the dealings of trustees with trust property and their cestuis que trust.

MOBILE AND OHIO R. R. CO. v. NICHOLAS.

1893. 98 Alabama, 92.1

APPEAL from Mobile Chancery Court.

Bill in equity by stockholder in Mobile & Ohio R. R. Co. against the railroad company, the Farmers' Loan & Trust Co., et al.

In 1876, the railroad company was in the hands of a receiver; decrees of foreclosure had been rendered in suits on mortgages; and its total indebtedness largely exceeded the value of the entire railroad property. An arrangement was made between the creditors and the company whereby the creditors accepted debentures in lieu of their original evidences of debt; and the great majority of the stockholders, in effect, conferred upon a trustee irrevocable power to vote upon the shares so long as any of the debentures should be outstanding. The shareholders assigned their stock to the committee of reorganization; the committee gave the Farmers' Loan & Trust Company an irrevocable power of attorney to vote upon the stock so long as any of the debentures should be outstanding. The shareholders who had thus assigned their stock to the committee received in exchange new certificates entitling them to all the rights and privileges which pertain to the ownership of the said shares, saving and excepting that such ownership is subject to the power heretofore granted by the owners of said shares to the Farmers' Loan & Trust Company, in trust for the security of the debentures, to vote upon said shares.

Under the foregoing adjustment, all the creditors, except those secured by newly issued first mortgage bonds, accepted the debentures provided for, in lieu of their former evidence of debt; the foreclosure decrees were assigned to the Farmers' Trust Company; the receiver, under the orders of the court, turned the property over to the railroad company; and the corporation resumed its control and management of its property and business.

In 1892, the plaintiffs denied the authority of the Trust Company, under the power of attorney held by it to vote their stock, and claimed for themselves the right to vote their own stock. The right of plaintiffs to vote at the stockholders' meeting was denied. Thereupon plaintiffs filed the present bill; praying, among other things, that the Farmers' Loan & Trust Company be enjoined from voting on the stock under the power of attorney; and that the railroad company be enjoined from refusing to accept the votes of plaintiffs and of other stockholders.

A preliminary injunction was granted. The defendants moved to dismiss the bill for want of equity, and to dissolve the injunction. The Chancellor overruled the motions. From his decrees an appeal was taken.

¹ Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — Ep.

E. J. Phelps, and Fred. W. Whitridge, for railroad company, appellants.

E. L. Russell, and R. P. Deshon, for appellants.

Hannis Taylor, for Farmers' Loan & Trust Co., appellants.

H. C. Tompkins, Gaylord B. Clark, William J. Curtis, and Alfred Jaretzki, for appellees.

COLEMAN, J. [After stating the case.] The facts stated in the bill show, that by the reorganization and compromise of 1876, perfected in 1879, the voting power was severed from the stockholder, and until the payment of the debentures, irrevocably vested in the Farmers' Trust Company and the debenture holders. It is contended for complainants that the agreement was, and "is void per se," because 1st: "It contravenes the language of the charter of the railroad company; and 2d, because it is against public policy."

The charter expressly provides, "Each share shall entitle the holder thereof to one vote, which vote may be given by said stockholder in person, or by lawful proxy."

So far, then, as the right to vote by proxy is questioned, the charter expressly grants the power, and the legislature has thus declared that it is not unlawful, per se, to separate the voting power from the stockholder, so far as the appointment of a proxy may be considered a severance of the voting power. Where a proxy is duly constituted, and the power of the appointment is without limitation, a vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not. to the same extent as if the vote had been cast by the stockholder in person. We do not hold that a power of attorney, absolute in its terms, will authorize the agent or proxy, to effect contracts, or legalize acts. outside of the scope of his authority, or contrary to law or public policy, neither could the stockholder in person by his vote effectuate such a result. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground, that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end, attempted to be effected by the exercise of the voting power. The distinction should be kept in view. Take the case of the Richmond & Danville Extension Company v. The Woodstock Iron Co., 129 U. S. 643, cited by complainant. The Woodstock Iron Co. agreed to pay thirty thousand dollars, if the Georgia Pacific Railroad was run through the town of Anniston, where the Woodstock Iron Co. owned a large plant, mines, and other property. The contract was held void as being against public policy. No question of the separation of the voting power from the shareholder, arose in the case. It was the character of the contract, the unlawful purpose in view, to build up the Woodstock Iron Co. at the expense of the stockholders of the railroad company that was condemned. The same principle applies to many other cases cited in which, it was held, "that contracts made to influence railroad companies in selecting their routes and erecting their

depots and stations by donations in land and money to some of its directors and stockholders were invalid," citing *Bestor* v. *Wathen*, 60 Ill. 131; *Linden* v. *Carpenter*, 62 Ill. 307.

Take the case of Hafer v. N. Y., Lake Erie & Western R. R. Co., 14 Weekly Law Bulletin, p. 68. The case is thus stated: "A controlling interest in the stock of the Cincinnati, Hamilton, and Dayton Railroad Company was bought up in 1882, and placed in the name of H. I. Jewett, who was Vice-President of the New York, Lake Erie, and Western Railway Co., under the agreement that he should give irrevocable proxy to such persons as the Erie should appoint to vote on the stock; that his stock certificates should be left in the hands of trustees, and that they should issue to the respective owners of the stock trust, or pool certificates for amounts equal to their respective equitable interest. On all stock thus pooled, the Erie agreed to guarantee a certain dividend."

The court declared the contract void "both on the ground that the power is denied to one corporation thus to acquire control of another, and that the stockholder can not barter away the right to vote upon his stock." True the opinion declares as an independent proposition, "that the stockholder can not barter away the right to vote upon his stock," and yet it is shown, by the facts of the case and the opinion, that the purpose to be effected by the barter of the right to vote, to wit, the placing "of an Ohio corporation into the hands of a New York corporation," the enabling "one corporation to acquire control over another" was illegal. Speaking of the facts of the case the opinion proceeds as follows: "It is obvious that the rule as to executed contracts can not be applied to the plaintiff for any such reason as that last mentioned, for he was not a party to the contract. There are other cases wherein special circumstances made it imperative, as a matter of good faith, that the contract should not be interfered with, and others, when the protection of interest acquired by innocent parties caused the court to refrain." There is no rule of law which requires contracts to be upheld which are void as against public policy, in order to preserve "good faith" or "innocent parties." The rule of estoppel is often applied to prevent undue advantage by one person over another, but the rule does not extend to contracts which are void because contravening public policy. Considering the opinion as an entirety, we do not regard it as authority to the proposition, that an agreement which provides for a separation of the right to vote from the holder of the stock is "per se," at all times and under all circumstances contrary to public policy and We have examined case after case and find generally that the agreements declared void by the courts, where the power to vote was separated from the stockholder and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful, such as the courts would not sanction if the principal had voted and not a proxy; and in cases of a mere dry trust, it is held that the stockholder might revoke a power of attorney in form irrevocable The doctrine as to dry trust does not arise in this case.

Certainly the case of Griffith v. Jewett, 15 Weekly Law Bulletin, 419, or of Moses v. Scott, 84 Ala. 608, do not sustain complainants' contention in this respect. If there were no precedents, upon principle, we would hold that in determining the validity of an agreement. which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties, neither will it annul them except to preserve its own majesty, and to conserve the greater interest of the public. Let us examine the conditions of the parties, the purpose in view and effect of the agreement of 1876, consummated in 1879, the consideration and interest surrendered and rights acquired by the readjustment, and issue of the debentures, the position of the complainants thereto, and the results of holding that reorganization, per se, void.

The complainants belong to the class known as "Assenting Stockholders." They surrendered their stock to the committee of reorganization in order that the power of attorney, executed to the trust company by the committee of reorganization, might be executed, and that the debentures should be issued to the creditors of the railroad corporation. The certificates of stock held by them show, upon their face. that they are subject to the power of attorney and to the rights of the debenture-holders. At the time the plan of adjustment was agreed upon the railroad company was in the hands of a receiver. Decrees of foreclosure rendered against the company. The indebtedness far exceeded the value of the railroad company's property. The execution of the decrees of foreclosure, by a sale of the property, and the prosecutions of the admitted claims against the railroad company, would necessarily have transferred the property to other parties and wiped out every vestige of present available interest or right of the stockholder, or hope of future profit. The creditors held the vantage ground, and in law their rights and interest were paramount to the stockholders. The latter might accept propositions but were in no position to dictate terms. These were the circumstances under which the settlement and agreement was made. Stated in short, the compromise and settlement led to the issue of the debentures to the creditors in lieu of their original evidences of debt, and a mortgage upon certain property to secure them, a plan for a sinking fund for their benefit, and the right and privilege under an irrevocable power of attorney to vote the stock until the debentures were paid. The power of attorney was not in perpetuity, or absolute, but only until the debentures were paid, and a fair construction under the circumstances required that the voting power should be used fairly and honestly to this end, or as stated in the agreement . itself, "for the uses and purposes declared in said memorandum, and until the same are fully accomplished." In consideration therefor the decrees of foreclosure, at first suspended, were transferred to the trust

company, creditors surrendered their claims and accepted in lieu thereof the debentures, the receiver under the orders of the court restored the property to the Mobile & Ohio Railroad Co., which resumed management and control of its property and affairs, and the stock preserved to the stockholder.

To this agreement over forty-five thousand out of a total of about fifty-three thousand of shares of stock assented, and among those which assented were complainants. The creditors had the right to accept debentures for their debts. The agreement continued in existence the corporation and preserved to the stockholders their stock. It did not violate the charter of the railroad corporation. The purpose was legal, the means used did not contravene any statute of the State or principle of public policy, and was within the scope of the power of the contracting parties. Good faith on the part of the assenting stockholders, whose interests were thus preserved, and to those who accepted the debentures in lieu of other evidences of debt and securities, and to those who have since purchased them upon the faith of the plan of compromise demand that the terms of the contract be fulfilled. Tested by any principle of law, legal or equitable, the agreement was not only valid but fair at least to the corporation company and stockholders.

[It was contended that the acceptance by the creditors, under an arrangement made in 1887–1888, of general mortgage bonds, extinguished the debentures issued under the previous settlement; and that thereby the stockholders became reinvested with the voting power which they had relinquished for the benefit of the debenture holders. The Court held, that the acceptance of the general mortgage bonds, under the conditions and terms then specified, did not effect an extinguishment of the debentures.

It was also contended, that the agreement by which the stockholder parted with his voting power created the relation of surety and creditor between the stockholder and the debenture holder; and "that the voting trust has been terminated by the extension and enlargement of the debt, and by the substantial modification of the terms upon which the voting franchise was to be exercised." The Court held, that the relation of surety and creditor did not exist.

A decree will be here rendered dissolving the injunction granted upon the original bill, and dismissing the original bill for want of equity.

1 In Durkee v. People, ex rel. Askren, A. D. 1895, 155 Illinois, 355, a by-law of a railroad corporation purported to confer on bondholders the right to cast one vote on every one hundred dollars of bonds; and the stock certificates contained an express statement that the stock was subject to the bondholders' right to vote at all meetings of stockholders.

Section 25 of the general railroad incorporation statute is as follows:

"In all elections for directors and managers of such railway corporations, every stock-holder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors, multiplied by the number of his shares of stock, shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner."

Contra to M.M.

HARVEY v. LINVILLE IMPROVEMENT CO.

1896. 118 North Carolina, 693.1

Action for an injunction and other relief, heard before *Timberlake*, J.

Plaintiff has an option for the purchase of a sufficient number of shares of the capital stock of the company to give him a majority thereof; and intends to purchase the same provided he can get control of the company. He asks (inter alia) for an injunction restraining Divine, Lenoir and MacRae (who are joined as defendants) from voting certain shares of stock, alleged to have now been purchased, by plaintiff, from Hahn, Worth and Kelsey.

It appeared that before plaintiff purchased said stock, a pooling agreement had been entered into by a majority of the stockholders, including Hahn, Worth and Kelsey. The plaintiff sought to have this pooling agreement declared invalid.

The pooling agreement was as follows:

"Whereas, the Linville Improvement Company is indebted to various persons in large sums of money, and is now in the hands of a receiver, appointed by a decree of the superior court of the County of Mitchell in the State of North Carolina; and whereas the undersigned, who are stockholders, and some of whom are also creditors of the said Company, are desirous to extricate the Company from its present financial embarrassment, pay off its debts, and enable it to resume its operations, now therefore we, the undersigned, stockholders of the Linville Improvement Company, have agreed, and do hereby agree with each other as follows:

"That, for the purpose herein set forth, we will pool of the stock of the said Company owned by us respectively, and will transfer the same to John S. Divine, T. B. Lenoir and Hugh MacRae, to be held by them and their successors upon the trusts and for the purposes herein declared. The said trustees shall give proper receipts for the stock so transferred to them. The said trustees shall have power to vote the said stock so transferred to them in all meetings of the stockholders of said Company, to borrow money to pay off and discharge the present indebtedness of the Company and to pledge the stock so held by them, or any part of it, as collateral security for the money so borrowed.

"If any vacancy among the said trustees shall occur at any time,

Said section 25 was enacted in pursuance of section 3, article 11, of the constitution, which contains the same provision and prohibition concerning the election of directors by stockholders as section 25 of the statute.

It was held, that the attempt to confer voting power upon bondholders (putting them on an equality in that respect with stockholders) was in conflict with the constitution and statute; and that hence votes cast by bondholders could not be counted.— ED.

1 Statement abridged. - ED.

the same shall be filled by the votes of the holders of the majority of the stock represented in the agreement. And the holders of the majority of such stock shall have the right, whenever they see proper to do so, to instruct the said trustees how to vote upon matters arising, or to arise, in any meeting of the stockholders of said Company. Any one or two of the said trustees may vote the entire stock so transferred to them in any meeting of the stockholders of said Company, being so duly authorized in writing by the other or others.

"Any one or more of the said trustees, or of their successors herein, may at any time be removed, and their places filled by a vote of the majority of the stock herein represented. All stockholders shall at once pay up all unpaid subscriptions owing to the Company on the stock held by them. A meeting of the stockholders executing this agreement may be called by the trustees at any time upon days' notice, and shall be called by them upon like notice at any time, upon request of any three or more of the stockholders executing this agreement; and in all such meetings, a majority of the said stock being present in person or by proxy, shall be a quorum; and any action taken by them shall be binding on all.

"This agreement shall be void if not executed by holders of the majority of all the stock of said Company, but when so executed it shall be enforced and binding upon all who sign it for the period of five years from the date hereof, unless it be sooner determined and put an end to by a vote of the holders of two-thirds of the stock represented herein. Upon the determination of this agreement the trustees shall transfer to each of us the stock owned by us respectively. Dated the 23d day of April, 1894."

Timberlake, J., refused to grant an injunction. Plaintiff appealed. Davidson & Jones, for appellant.

Junius Davis, for appellee.

CLARK, J. At common law stockholders could not vote by proxy. Taylor v. Griswold, 14 N. J. Law, 222, and other cases cited in Cook on Stocks, Sec. 610. This is now otherwise, but it is still held that each stockholder, whether by himself or by proxy, must be free to cast his vote for what he deems for the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each; and hence any combination or device by which any number of stockholders shall combine to place the voting of their shares in the irrevocable power of another is held contrary to public policy. Cone v. Russell, 48 N. J. Eq., 209. Various devices have been resorted to for the purpose of so tying up the stock that no one of the parties to the "pool" or combination can break the agree-"Irrevocable" proxies to vote the stock have been given to a designated party who acted as trustee or agent, but the courts held such proxies not irrevocable and that they might be revoked at any time. Cook, supra, Secs. 610, 622; Woodruff v. Dubuque, 30 Fed.

Rep., 91; Vanderbilt v. Bennett, 2 Railway & Corp. L. J., 409. Another plan was to place the stock of the various parties in the hands of trustees, with power to transfer the stock to themselves and to hold and vote the same, trustees' certificates being issued to the various parties, specifying the amount of stock so deposited by them and their interest in the pool, but the courts held that any holder of a trustee's certificate might at any time demand back his part of the Woodruff v. Dubuque, supra, and other cases cited in Cook, supra, Sec. 622. Another device was that the parties contracted together not to sell their stock for a specified time or only to a purchaser acceptable to them all. It was held that notwithstanding such contract any one of the parties might sell his stock to any one he pleased and at any time. Fisher v. Bush, 35 Hun, 642; Williams v. Montgomery, 68 Hun, 416. Another plan was to restrict by a by-law the right to transfer stock, but this was held illegal. Morgan v. Struthers, 131 U.S., 246, and other cases cited in Cook, supra, Sec. 332. A provision that a purchaser of a certificate of stock who sold in violation of the agreement should be entitled to the dividends, but should receive no right to vote, was likewise held invalid. Harper v. Raymond, 3 Bosw., (N. Y.,) 29. Numerous decisions affirm the correctness of the above rulings, which are based upon the illegality, because against public policy, of permitting large blocks of stock to be irrevocably tied up for the purpose of being voted in solido for the interest of a clique or section of the stockholders, and not according to the judgment of each individual stockholder for the benefit of the entire corporation. There are some few decisions trenching more or less upon the principles above stated, but we deem them contrary to sound principle of public policy, and hence not authority. In short, all agreements and devices by which stockholders surrender their voting powers are invalid. 5 Thompson Corporations, Sec. 6604. The power to vote is inherently annexed to and inseparable from the real ownership of each share, and can only be delegated by proxy with power of revocation. The "pooling" arrangement, admitted to have been entered into by the majority of stockholders in the present case, is contrary to public policy and voidable (Woodruff v. Dubuque, supra), and the plaintiff assignee of certain of the trustees' certificates \ is entitled to have his name entered as the owner and holder of the shares of stock represented by said trustees' certificates, and to have said shares issued to him, should the facts be found in accordance with his allegation, and to have the defendant restrained, till the hearing, from voting or controlling in any way the stock purchased by the plaintiff or in anywise interfering with the plaintiff's right to vote, control or dispose of said stock.

Error.

AVERY, J., did not sit on the hearing of this case.

SMITH v. SAN FRANCISCO & N. P. R. CO.

1897. 115 California, 584.1

ACTION, under s. 315, Civil Code, for the purpose of having it de clared that Sidney V. Smith was elected a director at the annual meet ing of the stockholders of the defendant company, instead of P. N. Lilienthal, who was declared elected. If certain votes which were rejected had been received. Smith would have been chosen. One of the votes rejected was that of Smith himself upon stock standing in his name.2 To justify the exclusion of Smith's vote, the defendants. in their answers, alleged the following facts: In February, 1893, the estate of James M. Donahue, deceased, was the owner of forty-two thousand shares or thereabouts of the capital stock of the defendant railway company, which the superior court of Marin county had ordered to be sold in the course of the administration of his estate. Prior to the sale an agreement was entered into between Smith, Foster, and Markham for the purchase of this stock as an entirety, upon the representations of Smith that upon acquiring the shares an agreement would be made by them whereby, in order to secure the control of the management and business policy of the railway company, and for its prudent and economical management in the interest of all of its stockholders, the said forty-two thousand shares should, for the term of five years thereafter, be voted as a unit in the election of directors of said railway company. In pursuance of this agreement Smith and Foster, on the 24th of February, made their joint bid for the shares, offering to purchase them as an entirety for the sum of eight hundred thousand dollars and upward, and by order of court their bid was accepted, and on March 23d the sale was completed and the price paid. After the making of the bid, and before the consummation of the purchase and completion of the sale, Smith prepared the agreement for the voting of the shares as a unit that had been contemplated by the parties to the purchase, and on the 22d of March the same was executed in triplicate between Smith, Markham, and Foster. By this instrument, after reciting therein that the parties thereto had purchased the forty-two thousand shares of stock, and had agreed to retain the power of voting the stock for five years, "so as to keep the control of the corporation from passing to persons other than themselves," it was "mutually agreed between said Foster, Markham, and Smith that they will, during said period, retain the power to vote said shares in one body, and that the vote which shall be cast by said shares, whether for directors or for any other purpose, shall be determined by ballot between them or their survivors." It was in the contemplation of the

¹ Statement rewritten. Arguments and part of opinion omitted. - ED.

² The votes of Gundecker and Wagner were also rejected; the ground being that they were not bona fide stockholders. The statement as to their right is here omitted. — ED.

parties to the agreement that they might sell or otherwise dispose of some of the shares, and, accordingly, they made provision in this instrument for retaining the right to vote the stock so sold by them, and annexed thereto the form of an agreement to be taken by them from their vendees. This form or draft recited the purchase of the fortytwo thousand shares by Foster, Smith, and Markham, and that, "for the purpose of keeping control of said road in the interest of themselves and of all persons who shall buy any portion of the stock from them," they have agreed that for the period of five years "they shall vote the said stock in one block" at all elections for officers. The purchase of the stock by Foster, Smith, and Markham was completed and the price therefor paid on the 23d of March, and twelve thousand three hundred and thirty-six shares of the stock were transferred on the books to each of them -five thousand shares being left in the name of the Mercantile Trust Company, subject to some prior trust. Prior to the day for the election in 1896, a conference was called to be held between Foster, Smith, and Markham, upon proper notice therefor, to determine by ballot how the vote of the shares should be cast at the next annual meeting for directors, and, in accordance with said notice, said conference was held, at which Foster and Markham were present, and, upon a ballot had thereat, it was determined that said shares should be voted for Markham, Newhall, and Lilienthal as directors. It was shown at the trial that at the meeting of the stockholders, held on February 25th, Smith tendered a vote for the shares standing in his name, and, at the same time, Foster presented the vote of the same stock by himself and Markham in behalf of Smith. Mutual protests against the votes were made by different stockholders, and the vote cast by Foster and Markham was received and counted, and that cast by Smith was rejected. Smith also testified that, after receiving the notice for the conference to determine the ballot to be cast, he informed Foster and Markham that he did not recognize the validity or legality of the agreement, and that he withdrew from the same, and would not be bound by anything which they might do there-

At the trial the defendants sought to introduce in evidence the agreement of March 22d, and offered to prove, in connection therewith, the matters set forth in their answer relative thereto; but upon the objection by the plaintiffs to this offer, "on the ground that said agreement was not a proxy, and did not provide that any of the parties thereto should vote the stock belonging to the other, and that it was revoked before the election and was invalid as against public policy," the evidence was excluded, the court saying: "I will assume, for the purpose of my ruling, that it was a valid agreement, but that it was not an agreement which gave authority to any other person to cast the vote of Mr. Smith."

The superior court found that the agreement by Smith with the other stockholders did not preclude him from the right to vote the

stock standing in his own name as he might choose, and that the vote by the other stockholders for his stock was unauthorized, and his own vote should have been received. Judgment was thereupon rendered that Lilienthal had not been chosen as a director, and was not entitled to exercise the office, and that at the said election Smith was chosen one of the directors, and was entitled to be so recognized. A motion for a new trial on behalf of the defendants was denied, and from both the judgment and the order denying the new trial appeals have been taken.

W. S. Goodfellow, Jesse W. Lilienthal, and Garret W. McEnerney, for appellants.

Page, McCutcheon & Eells, for respondents.

HARRISON, J. . . .

. . . for the purpose of this appeal it is to be assumed that the evidence offered by the defendants would sustain the allegations of their answer, and the sufficiency of these averments to authorize the exclusion of the vote by Smith is to be determined. . . . That the instrument of March 22d constitutes an agreement that the forty-two thousand shares are to be voted "in one body," and that the parties thereto agreed that "they" would vote the stock "in one block," is stated therein in express terms. By this instrument they also "mutually agreed" that "the vote" to be cast by said shares should be determined by ballot "between them" or their survivors. To "determine by ballot" is to ascertain the result of balloting upon a proposition by those entitled to cast the ballots; and the "vote"—that is, the voting paper or ticket to be cast for the officers, which the parties agreed should be thus determined — is to be the same for the entire forty-two thousand shares. That by virtue of this agreement an authority was given by each of the parties to the others to determine "the vote" to be cast by the forty-two thousand shares of stock is too clear for argument. When they mutually agreed that they would "determine" between them the vote which "shall be cast" for directors, they declared by necessary implication that such vote should be cast in accordance with the results of that ballot, and that if either of them should fail to cast the vote as should be determined by the ballot, the vote so determined might be cast by the others. If we should hold that this instrument is to be construed as not giving authority to the majority of the parties thereto to cast the vote of the entire forty-two thousand shares of stock, as might be determined upon such ballot, we should be compelled to hold that the instrument was prepared in disregard of the agreement between the parties, and of the purpose for which it was to be executed. If there is any ambiguity in the language used for the expression of that agreement, it is to be construed so as to carry the agreement into effect, rather than to defeat its operation. No particular form of words is requisite to constitute a proxy. (Morawetz on Corporations, sec. 486.) Like any other agency, the instrument by which it is created may be informal, but if, in order to give effect to its language in view of the purpose for which it is executed, it is necessary to construe the instrument as creating an agency, such construction will be given.

The instrument executed between the parties must, therefore, be held to be a proxy, and to authorize the vote of the forty-two thousand shares of stock to be cast in accordance with the determination of the majority of the parties thereto, and, if it was made upon a consideration sufficient to bind the parties to its enforcement, it must be !! regarded as still operative. One of the inducements for the purchase of the stock, and under which the parties entered into the agreement, was that the shares should be voted in one body, and held for five years as a unit. It is immaterial that the voting agreement was not reduced to writing and executed until after the bid had been made for the stock. It was so executed before the parties thereto had completed the purchase and become the owners of the stock by paying the purchase price. Nor is the validity of the agreement or the effect of its terms different by reason of different certificates having been issued in the names of the several parties to the transaction, rather than in the name of one of them. The agreement between them was with reference to the forty-two thousand shares of stock, and that it should be voted as a unit, and the purpose of the agreement was the economical management of the road, and to prevent irresponsible persons from getting control. It was within the power of the parties to contract in reference to this property as fully as with regard to any other property. They were at liberty to make as a condition of their purchase that its management should be held by either of them, or by a majority of the three, and the terms of the agreement for such purchase could not be repudiated by either after the purchase had been made. It may be assumed that neither of the parties would have entered into the transaction, or agreed upon the purchase of the stock, except upon these conditions, and it must be held that each contributed his money to the purchase of the stock upon the promise made to him by the others. There was thus a sufficient consideration for the agreement granting the right to vote the stock. It was in the nature of a power coupled with an interest, and, being given for a valuable consideration, could not be revoked at the pleasure of either. (Hey v. Dolphin, 92 Hun, 230.)

Although the court in excluding this evidence, assumed that the instrument was valid, counsel for respondents have presented an argument in support of their further objection thereto, that the instrument is invalid by reason of being against public policy, and it therefore becomes necessary to consider this objection, inasmuch as the action of the court, rather than its reason for so acting, is to be reviewed; for, if the instrument is invalid, the refusal of the court to allow any effect to be gained from its exercise was proper.

"Public policy" is a term of vague and uncertain meaning, which it pertains to the law-making power to define, and courts are apt to

encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Sir George Jessel, as Master of the Rolls, said in Besant v. Wood, L. R. 12 Ch. Div. 605, that public policy is "to a great extent a matter of individual opinion, because what one man or one judge might think against public policy, another might think altogether excellent public policy"; and in another case (Printing, etc., Co. v. Sampson, L. R. 19 Eq. 465), the same jurist said: "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." It is not in violation of any rule or principle of law for stockholders, who own a majority of the stock in a corporation, to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and, for this purpose, to appoint one or more proxies who shall vote in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect, and they may do this either by themselves, or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Any plan of procedure they may agree upon implies a previous comparison of views, and there is nothing illegal in an agreement to be bound by the will of the majority as to the means by which the result shall be reached. they are in accord as to the ultimate purpose, it is but reasonable that the will of the majority should prevail as to the mode by which it may be accomplished. It would not be an illegal agreement if articles of partnership should provide that stock in a corporation owned by the partnership, though standing in the individual names of the partners, should be voted by one of its members, and it is no more against public policy for such an agreement to be entered into between stockholders whose interests in the stock are separate than where their interests are joint. Viewed from considerations of public policy merely, it is immaterial whether such an agreement is made by the members of an existing partnership, which owns the shares, or in pursuance of an agreement by two or more persons to form a partnership for their purchase, or to purchase them for their joint account, or as one of the terms of an agreement for their purchase, by persons who contemplate no relation to each other further than that of owning stock in the same corporation. Such agreement would, in any case, be outside of the corporation and disconnected with the interest of every other stockholder, and, in either case, the same rules would control. Whether such an agreement is illegal, so that any action or vote under it can be set aside, or is of such a character that it will not be enforced, will depend upon the object with which it is made, or the acts that are

done under it, and will be governed by other rules of law. [Omitting quotations and references.]

In cases of "voting trusts," where the owners of stock transfer the shares to trustees, with authority to vote at elections according to the direction of a majority of those holding trust certificates, and the only consideration for such transfer and agreement is the mutual promises of the several stockholders, it has been held that any stockholder may revoke his agreement and withdraw his stock at will; and it is also held that stockholders, who become such after an agreement of this nature is entered into, are not bound by its terms, but will hold their shares freed from the limitations of the agreement. (Fisher v. Bush, 35 Hun, 641; Woodruff v. Dubuque, etc., Co., 30 Fed. Rep. 91; Brown v. Pacific Mail S. S. Co., 5 Blatchf. 525; Griffith v. Jewett, 15 Week. Law Bull. 419.) . . .

The agreement in question cannot be regarded as illegal by reason of being in restraint of trade. The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673 of the Civil Code makes void every contract by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property, except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy, and there is nothing inconsistent with public policy for two or more persons, who contemplate purchasing certain property, to agree with each other, as a condition of the purchase, that neither will dispose of his share within a limited period, or for less than a fixed sum, or except upon certain limitations. They have the same right to contract with reference to the terms under which they will hold or dispose of the property after it shall have been purchased, as they have to agree upon any other terms upon which the purchase shall be made, and they no more violate a rule of public policy in making such agreement a consideration of their purchase than would two or more partners who should purchase property for partnership purposes, and agree that it should not be disposed of unless their vendee would assent to certain conditions regarding its use. These terms enter into, and form a part of, the consideration for the agreement to purchase, and are as binding and enforceable as any other terms of the agreement. England Trust Co. v. Abbott, 162 Mass. 148; Hodge v. Sloan, 107 N. Y. 244; 1 Am. St. Rep. 618; Williams v. Montgomery, 148 N. Y. 519; Matthews v. Associated Press, etc., 136 N. Y. 333; 32 Am. St. Rep. 741.) The contract in Fisher v. Bush, 35 Hun, 641, was held to be invalid for want of any other consideration than the mutual promise of the parties; but it was said in that case: "If these parties and their associates were the promoters of this corporation, then, doubtless, they could have entered into a valid agreement regulating a sale of the same, and requiring the owners to hold them from market for a reasonable and definite period of time, and thus forbidding a sale by either of his interests to one against whom his associates might have a reasonable objection. (Moffatt v. Farquhar, 7 Ch. Div. 591; reported in 23 Moak Eng. Rep. 731.) A stipulation of that character would not be illegal as against public policy, as it would be simply a provision assented to by all that the newcomer into the business transaction should be with the approval of the other joint owners."

Neither is it illegal or against public policy to separate the voting power of the stock from its ownership. The statute authorizes the stockholder to vote by proxy; and it was held in People's Bank v. Superior Court, 104 Cal. 649, 43 Am. St. Rep. 147, that a by-law restricting the selection of proxies to stockholders was invalid; that the statute places no limitation upon the right of selection, and that a stockholder may appoint as his proxy one who is an entire stranger to the corporation. The right to appear by proxy implies of itself that the voting power may be separated from the ownership of the stock. and, unless the authority of the proxy is limited by the terms of his appointment, he is necessarily required to use his own discretion in any vote that he gives. Being the agent of the stockholder, he is required to use this discretion in behalf of his principal; but he is at liberty to use his own discretion as to the means by which his principal's interest will be best subserved. The cases in which it has been said that the stockholder could not divest himself of the voting power of his stock, and that it should not be separated from the ownership of the stock, were cases which involved either the sufficiency of the agreement by which the voting power was transferred, or the validity of the purpose for which the power was to be exercised. The proxy must exercise a discretion of the same nature as that which the stockholder is authorized to exercise, and an authority to do otherwise would be invalid; but the authority to exercise a discretion differs from an authority to perform a particular act. Under an appointment without words of limitation the proxy may act against the interests of the stockholder, or even against the interests of the corporation, and the corporation, as well as the stockholder, will be bound by his act as fully as if the stockholder had acted in person, while, if the authority had been directed in terms to that act, it might have been invalid. The distinction is that between an unlawful exercise of a lawful power, and the attempt to authorize the exercise of an unlawful power. The question has been presented in cases of voting trusts, but an examination of these cases will show that the question has arisen either when the authority was expressly given to carry out some illegal purpose, or when, having been given without any consideration, though purporting to be for a definite term, subsequent owners of the stock have sought to revoke it before the expiration of the term. (Shepaug Voting Trust Cases, 60 Conn. 553, sometimes

reported under the name of Bostwick v. Chapman; White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 178.) We have been eited to no instance where the purpose of a proxy given upon a sufficient consideration was lawful, and the person by whom the proxy was created continued to be the owner of the stock, in which the agreement has been held invalid. The stockholder cannot separate the voting power from his stock by selling his right to vote for a consideration personal to himself alone, any more than he could agree for the same consideration to cast the vote himself, and an agreement with others to appoint a proxy upon the same considerations would be equally invalid. In Cone v. Russell, 48 N. J. Eq. 208, an agreement by the purchaser of stock to give to other stockholders his irrevocable proxy for the purpose of securing and maintaining the control of the company was held invalid, for the reason that it was one of the terms of the agreement that the directors, to be elected under its provisions, should employ the one giving the proxy at a fixed salary during its existence. an agreement was held to operate as an inducement to elect directors who would not act disinterestedly for the benefit of all of the stockholders, but rather to promote the interest of the parties to the agreement alone, and was therefore void, as being against public policy.

The court, however, said: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders." It was upon this principle that the agreements in Hafer v. New York etc. R. R. Co., 14 Week. Law Bull. 68, Guernsey v. Cook, 120 Mass. 501, and Fennessy v. Ross, 5 N. Y. Sup. Ct. App. Div. 342, were held invalid. The same principle was declared in Gage v. Fisher, 65 N. W. Rep. 809. In Mobile etc. R. R. Co. v. Nicholas, 98 Ala. 92, the court held that there was nothing illegal or contrary to public policy in separating the voting power of the stock from its ownership, saying: "Where a proxy is duly constituted, and the power of the appointment is without limitation, the vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end attempted to be effected / by the exercise of the voting power."

From the foregoing considerations it follows that the superior court erred in finding that Gundecker and Wagner were bona fide stockholders in the defendant railway company, and also in refusing to receive in evidence the instrument of March 22d, and the evidence offered by the defendants in connection therewith, for the purpose of sustaining the averments of their answer.

The judgment and order denying a new trial are reversed.

VAN FLEET, J., McFarland, J., and Henshaw, J., concurred. Beatty, C. J., dissenting. — I dissent from the judgment and from the conclusions of the court on both of the principal points decided.

The contract between Smith, Markham, and Foster was, in my opinion, void as against the policy of the law giving to the holders of a majority of the stock of a corporation the right of control. Its sole purpose and object was to give to a minority of the stockholders the power to control the affairs of the corporation against the will of the majority, and that object is secured by means of this judgment. There is not time at my command to go over the decisions, but I am satisfied that the weight of authority is against the validity of any contract by which the sole owner of stock parts irrevocably with the right to vote it, with the effect of putting a minority in control of the corporation.

[Remainder of opinion omitted.]

Rehearing denied.

BRIGHTMAN v. BATES.

1900. 175 Massachusetts, 105.1

Holmes, C. J. These are actions upon a covenant executed by the defendants. The covenant recites that 1,360 shares of the stock of the Union Street Railway Company in New Bedford have been or are about to be purchased by a syndicate, under an agreement of September 4, 1894, that the plaintiff has been largely instrumental in organizing the syndicate, and that "he considers that for his services therein in case the syndicate is formed, and the aforesaid shares purchased, he should receive for his compensation" a certain amount of stock. These recitals are followed by several covenants on the part of the defendants and one other to give the plaintiff, in stock of the company at \$169 a share, a commission of \$4 a share "upon the number of shares of said stock we sell to said syndicate, less the number of shares we have severally subscribed as members of said syndicate," and certain other deductions, in case the compensation was not got from the syndicate. The judge before whom the case was tried found for the plaintiff, and the case is here upon a report of requests for rulings which in various forms raise the question whether such a finding can be justified in law.

The syndicate referred to was formed under another written agreement, whereby the subscribers recite their desire to become members of it to the end that control of the railway company and advantage to them may be gained, agree to take the shares set against their names at \$169 a share, and further agree after the purchase to enter

1 Statement omitted; also part of opinion. - ED

into a pooling contract whereby all the syndicate stock "shall be voted at each annual meeting for a period of not less than three years, for such board of directors as shall be named" by a committee of five of the subscribers, with power to a majority of them to fill any vacancy in the committee. It is said that this agreement was illegal, and that the covenant sued upon was so directly aimed at helping to bring the unlawful arrangement about that it must fall with the other. Barnes v. Smith, 159 Mass. 344, 347; Gibbs v. Consolidated Gas Co., 130 U. S. 396.

Without deciding whether, if the covenant was dependent upon the rendering of further services, it was so closely connected with the syndicate agreement as to fall if the latter cannot be sustained, we pass to the question whether the latter agreement is unlawful on its face, bearing in mind that unless it is unlawful on its face it has the advantage of a finding in favor of the plaintiff. In dealing with this question it does not need to be said that combination of common interests is necessary, and constantly is taking place. It is as legitimate for a majority of stockholders to combine as for other people. fact that they expect "gain and advantage" - in the words of the syndicate agreement - to accrue to them, does not make the combination unlawful. That expectation and intent would have that effect only if the gain was to be at the expense of the corporation, or in some way was intended to work a wrong to the other stockholders. No such intent appears, and although it is impossible not to view such an arrangement with suspicion, it is also impossible to let suspicion take the place of proof.

The only serious ground of objection is the agreement that the stock "shall be voted at each annual meeting" for three years, for a board of directors named by the committee. It is suggested that this was an unlawful attempt by the contracting parties to deprive themselves in advance of their deliberative power and duty as stockholders, and to submit themselves to the dictation of five men who in the future might not be even members of the corporation. Perhaps the notion upon which these suggestions are founded has been pressed somewhat further than would be warranted by more far-seeing views. but we have no occasion to discuss it in this broad form. The question before us is not whether it would be possible to carry out the contract in a way which would have made the contract bad if specified in it, but whether it was impossible to carry out the contract in a way which might lawfully have been specified in advance. We put the question in this form because there is no doubt that the subscribers might actually have done the things stipulated without giving any one a right to complain. That is to say, they might have held their stock and voted by previous understanding according to the advice of the committee, as long as they chose. The question is what they might contract to do; for this is supposed to be a case where a contract to do lawful acts is unlawful.

The syndicate agreement does not specify how it is to be carried out. It contemplates the making of another contract. As the later contract is to be a pooling contract, it was possible, if not probable, that one element of the arrangement would be that the title to the stock should be given to a trustee, and this happened in fact. During the three years the stock seems to have been held by a bank. The stock was transferred to it, and was not transferred to the members of the syndicate. But it would have been possible, consistently with the terms of the syndicate agreement, that the committee who were to name the board of directors themselves should be the trustees. In that case the trustees, of course, would have voted on the stock. They, not their cestuis que trust, would have been the stockholders for the time being. We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it. Brown v. Pacific Mail Steamship Co., 5 Blatchf. 525, 527. See Greene v. Nash, 85 Maine, 148.

Supposing that the committee had been trustees, what would the syndicate agreement have amounted to then? Merely an agreement by each of the trustees to vote as they should jointly agree to vote, and an agreement by the subscribers not to demand back their shares for three years. The latter term certainly is not illegal, whether valid or not. A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he cannot terminate it at will, and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. See Williams v. Montgomery, 148 N. Y. 519, 525. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other States show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together. Faulds v. Yates, 57 Ill. 416; Smith v. San Francisco & North Pacific Railway, 115 Cal. 584; Havemeyer v. Havemeyer, 11 Jones and Spen. 506, 512, 513. Affirmed, according to Beach, Corporations, § 304, n. 6, and Fisher v. Bush, 35 Hun, 641, in 86 N. Y. 618. See Brown v. Pacific Mail Steamship Co., 5 Blatchf. 525, 527.

We have considered such decisions elsewhere as have been called to our attention or found by us. Few of them are by courts of final resort. Nothing that we have found in them satisfies us that the judge below was not warranted in finding for the plaintiff.

Judgment for the plaintiff.

BEATTY v. NORTHWESTERN TRANSPORTATION CO.

1884. (Chancery Division of Ontario), 6 Ontario, 300.
1885. (Court of Appeal of Ontario), 11 Ontario Appeal, 205.
1886. (Supreme Court of Canada), 12 Canada Supreme Court, 598.
1887. (Judicial Committee of Privy Council), L. R. 12 App. Cases, 589.

BILL IN EQUITY by Henry Beatty, a minority stockholder, against the North Western Transportation Company, and its directors, including James H. Beatty. The bill seeks to rescind the purchase by the corporation of the steamer *United Empire*. The defendants filed a statement of defence. The plaintiff joined issue, and the case was heard before Boyd, Chancellor.

The material facts are as follows: -

The Transportation Company is a corporation, with a capital stock of \$300,000, divided into 600 shares of \$500 each. On January 1, 1883, James H. Beatty owned 200 shares, and was a director. He was then building a steamboat, to be called the *United Empire*; and desired to sell it to the company. In January, 1883, he purchased 101 additional shares. On the day of the annual meeting in February, 1883, he transferred 5 shares to Rose and 5 to Laird, whereby they became qualified to be directors; and they were then elected directors. The board was composed of five directors; and James H. Beatty, Rose, and Laird constituted a majority.

The board of directors, while James H. Beatty was present and acting, passed a vote (called a bye-law) to purchase the steamboat of James H. Beatty upon specified terms. The directors, at the same time, voted to submit the said bye-law to a special meeting of the stockholders. At such meeting, a vote to adopt the bye-law was carried by a vote of 306 to 289. Of the 306 affirmative votes, 291 were cast by James H. Beatty, and ten by his transferees, Rose and Laird.

The bill charges that the purchase was not entered into by James H. Beatty et als. on behalf of the company in good faith for the purpose of promoting the best interests of the company, but for the purpose of serving their private interests contrary to their duty to the company and its stockholders. Subsequently all charges of fraud and collusion were abandoned. It was proved by uncontradicted evidence, and was substantially admitted, that, at the date of the purchase, the acquisition of another steamer was essential to the efficient conduct of the company's business; that the *United Empire* was well adapted for that purpose; that it was not within the power of the company to acquire any other steamer equally well adapted for its business;

¹ Statement compiled from the various reports. The greater portions of the arguments and opinions are omitted. — Ed.

and that the price agreed to be paid for the steamer was not excessive or unreasonable.

The case was heard in the Chancery Division, at Toronto, before BOYD, CHANCELLOR, who decreed that the purchase should be set aside. (6 Ontario, 300.)

The Court of Appeal of Ontario (Hagarty, C. J., Burton and Osler, JJ.) unanimously reversed the decree of the Chancellor. (11 Ontario Appeal, 205.)

The Supreme Court of Canada (RITCHIE, C. J., FOURNIER, HENRY, TASCHEREAU, and GWYNNE, JJ.) unanimously reversed the last mentioned decision, and restored the decree of the Chancellor.

SIR W. J. RITCHIE, C. J. Though it may be quite true, as a general proposition, that a shareholder of a company, as such, may vote as he pleases, and for purposes of his own interest, on a question in which he is personally interested, does that proposition necessarily cover this case? Is it not abundantly clear that, whatever a simple stockholder may do, no director is entitled to vote, as a director, in respect to any contract in which he is personally interested? Directors cannot manage the affairs of the company for their own personal and private advantage; they cannot act for themselves and, at the same time, as the agents of the corporation whose interests are conflicting; they cannot be the sellers of property and the agents of the vendee; there must be no conflict between interest and duty; they cannot occupy a position which conflicts with the interests of the parties they represent and are bound to protect. Is it not somewhat of a mockery to say that this by-law and sale were invalid and bad, and not enforceable against the company as being contrary to the policy of the law by reason of a director entering into the contract for his personal benefit where his personal interests conflicted with the interests of those he was bound to protect, but that it can be set right by a meeting of the shareholders, by a resolution carried by the vote of the director himself against a large majority of the other shareholders? If this can be done, how has the conflict between self-interest and integrity ceased?

While recognizing the general principle of non-interference with the powers of the company to manage its own affairs, this case seems to me to be peculiarly exceptional; a director, acting for the company, makes a sale, acting for himself, to the company, a transaction admittedly indefensible; this purchase is submitted to the shareholders, and the director, having acquired a controlling number of votes for this purpose, secures a majority by his own votes thus obtained without which the purchase would not have been sustained, and confirms as a shareholder his invalid act as a director, and thus validates a transaction against which the policy of the law utterly sets its face.

It does seem to me that fair play and common sense alike dictate that if the transaction and act of the director are to be confirmed, it should be by the impartial, independent, and intelligent judgment of the disinterested shareholders, and not by the interested director himself, who should never have departed from his duty. If he had done his duty and refrained from acting in the transaction as a director the by-law might never have been passed, and the contract of sale never entered into; and having acted contrary to his duty to his co-shareholders he disqualified himself from taking part in the proceedings to confirm his own illegal act; and then to say that he was a legitimate party to confirm his own illegal act seems to me simply absurd, for nobody could doubt what the result in such a case would be, as the futileness of the interested, but discontented, shareholders attempting to frustrate the designs of the interested director with his majority is too manifest; but he, if he had done his duty towards them and refrained from entering into the transaction, would never have been in the position of going through this farce of submitting this matter to the shareholders, and when so submitted of himself voting that he, though he had acted entirely illegally, had done right, and thereby binding all the other shareholders who thought the purchase undesirable; or in other words, by his vote carrying a resolution that the bargain he himself had made for the company as buyer, from himself as seller, was a desirable operation and should be confirmed.

I rest this case entirely on the position Beatty held as a director, and the duty which pertained to that office. In that view it is not necessary to discuss how far, or rather under what circumstances a shareholder may vote at a general meeting of shareholders on matters on which he is individually interested. I cannot, however, but look upon it as rather a bold and startling proposition that a shareholder should be able to offer a property for sale to the company from a bare majority of votes and by such vote, against the will of all the other shareholders, compel the company to become the purchaser at his own price and on his own terms, against the wish of all the other

against 306.

HENRY and GWYNNE, JJ., delivered concurring opinions.

The case was then carried by appeal to the Judicial Committee of the Privy Council.

shareholders, who may, as in this case, be a minority of 289 votes

Sir R. E. Webster, Attorney General, and Jeune, for appellants, contended that the judgment of the Court of Appeal was correct, and that of the Supreme Court should be reversed. The fiduciary position of J. H. Beatty as director had, it was submitted, nothing to do with the question. His vote as shareholder at the general meeting was the thing in dispute, whether he was prevented from giving it on a matter in which he was personally interested. As for his voting for the bye-

law at the directors' meeting it had no other object or effect than that of bringing the matter before a general meeting. At the most it was voidable and not void, and the question was as to the validity of its ratification, and that depended upon the validity of the appellant's vote as a shareholder. There is no principle of equity why a shareholder should be disqualified from voting at a general meeting, or why his vote should be examined and disallowed, except for fraud. The disqualification of directors results from their agency. The shareholders are principals. In this case if the majority were interested in the vessel sold, the minority were interested in a competing line and had interests adverse to the company; and the validity of their votes might also on the respondent's contention be examined on the ground of personal interest. The motives of shareholders for their votes cannot be inquired into. If there is no fraud they are free to exercise their own judgment as they please, and that exercise cannot be called in question) by other shareholders. Reference was made to Pender v. Lushington; 1 M'Dougall v. Gardiner; 2 East Pant Du United Lead Mining Company v. Merryweather; Mason v. Harris.4

Sir Horace Davey, Q. C., and Bremner, for respondent.

[Argument omitted.]

SIR RICHARD BAGGALLAY.

The question involved is doubtless novel in its circumstances, and the decision important in its consequences; it would be very undesirable even to appear to relax the rules relating to dealings between trustees and their beneficiaries; on the other hand, great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, if they also stood in some fiduciary relation to the company.

It is clear upon the authorities that the contract entered into by the directors on the 10th of February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means.

The only unfairness or impropriety which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant J. H. Beatty possessed a voting power as a shareholder which enabled him, and those who thought with him, to adopt the bye-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and his co-directors had entered, or to make a similar contract, which latter seems to have been

¹ 6 Ch. D. 73.

^{8 2} H. & M. 254.

² 1 Ch. D. 13.

^{4 11} Ch. D. 107.

what was intended to be done by the resolution passed on the 7th of February.

It may be quite right that, in such a case, the opposing minority should be able, in a suit like this, to challenge the transaction, and to shew that it is an improper one, and to be freed from the objection that a suit with such an object can only be maintained by the company itself.

But the constitution of the company enabled the defendant J. H. Beatty to acquire this voting power; there was no limit upon the number of shares which a shareholder might hold, and for every share so held he was entitled to a vote; the charter itself recognised the defendant as a holder of 200 shares, one-third of the aggregate number; he had a perfect right to acquire further shares, and to exercise his voting power in such a manner as to secure the election of directors whose views upon policy agreed with his own, and to support those views at any shareholders' meeting; the acquisition of the *United Empire* was a pure question of policy, as to which it might be expected that there would be differences of opinion, and upon which the voice of the majority ought to prevail; to reject the votes of the defendant upon the question of the adoption of the bye-law would be to give effect to the views of the minority, and to disregard those of the majority.

The judges of the Supreme Court appear to have regarded the exercise by the defendant J. H. Beatty of his voting power as of so oppressive a character as to invalidate the adoption of the bye-law; their Lordships are unable to adopt this view; in their opinion the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice in the views expressed by him in the Court of Appeal, that the matter might have been conducted in a manner less likely to give rise to objection.

Their Lordships will humbly advise Her Majesty to allow the appeal; to discharge the order of the Supreme Court of Canada; and to dismiss the appeal to that Court with costs; the respondent must bear the costs of the present appeal.

JESSEL, M. R., IN PENDER v. LUSHINGTON.

1877. Law Reports, 6 Chancery Division, 70, pp. 74-76.

Jessel, M. R. This is a motion by Mr. J. Pender, on behalf of himself and all shareholders who voted with him against an amendment, and the Direct United States Cable Company, Limited, as Plaintiffs, against E. H. Lushington and other gentlemen as Defendants, in substance to obtain the opinion of the Court that certain votes at a general meeting on behalf of the Plaintiff were improperly rejected by the

chairman. That is the substance of the case, though there are other technical questions to which I must also refer.

In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise — that is as regards a Court of Law as distinguished from a court of morality or conscience, if such a court exists. I put to Mr. Harrison, as a crucial test, whether, if a landlord had six tenants whose rent was in arrear, and three of them voted in a way he approved of for a member of Parliament, and three did not, the Court could restrain the landlord from distraining on the three who did not, because he did not at the same time distrain on the three who did. He admitted at once that whatever the motive might be, even if it could be proved that the landlord had distrained on them for that reason, that I could not prevent him from distraining because they had not paid their rent. I cannot deprive him of his property, although he may not make use of that right of property in a way I might altogether approve. That is really the question, because if these shareholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it are entirely beside the question.

I am confirmed in that view by the case of Menier v. Hooper's Telegraph Works,1 where Lord Justice Mellish observes: "I am of opinion that, although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration." In other words, he admits that a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote for motives or promptings of what he considers his own individual interest.

This being so, the arguments which have been addressed to me as to whether or not the object for which the votes were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shews a want of appreciation of the

¹ Law Rep. 9 Ch. 350, 354.

principles on which this company was founded, appear to me to be / wholly irrelevant. Therefore I do not intend to enter into the question as to what the objects of the company were, or what was the mode in which it was proposed to carry out those objects. I am only bound to decide whether or not these people were entitled to vote. To that question I am now going to address myself.¹

PRICE v. HOLCOMB et al.

1893. 89 Iowa, 123.2

Action in Equity, by minority stockholder in the Iowa Rolling Mill Company, to set aside a sale of the corporate property to Holcomb. The property was purchased by Holcomb as the highest bidder at a public sale, which was authorized by a resolution passed at a meeting of the stockholders. Out of $393\frac{1}{2}$ shares voted in the affirmative, Holcomb voted, in his own right, on $177\frac{1}{2}$ shares; and also voted, as a proxy, on 180 shares.

In the District Court a decree was entered dismissing the plaintiff's petition. Appeal.

C. L. Poor and Thomas Hedge, for appellant.

Power & Huston, for appellees.

GIVEN, J. [After deciding other questions.] The appellant cites cases announcing the familiar rule that a party holding a fiduciary relation to trust property can not become a purchaser thereof, either directly or indirectly. It is contended that the defendant Holcomb, in voting the majority of the stock, as already stated, stood in the place of the corporation, and was charged with its trust relation toward the stockholders, and, therefore, within the rule forbidding him from purchasing the property. Mr. Holcomb's relation as a stockholder was not that of agent or trustee, but a joint owner. An agent or trustee is charged with the interests of his principal or cestui que trust, and can not have any interest adverse thereto. so, however, as to a stockholder. He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves. The rule applicable to stockholders is well stated in Rice's Appeal, 79 Pa. St. 204, as follows: "Where a person has the actual control of a corporation, whether

² Statement abridged. Only so much of the case is given as relates to a single point.— ED.

¹ In Dorchester v. Youngman, A. D. 1880, 60 New Hampshire, 385, it was decided that a citizen's special pecuniary interest in a question of town affairs does not disqualify him from voting upon it. Seven suits had been brought by the town against different citizens. A vote in town meeting, authorizing the settlement of these suits, was passed by the help of the votes of the seven defendants. Held, that their interest did not disqualify them from voting.—ED.

such control arises from the ownership of a majority of the shares, or from his position or influence, he is held to most rigid good faith. The onus is upon him to show the fairness of the transaction if it is called in question." This brings us to inquire whether the appellee Holcomb acted in good faith. It is unnecessary that we extend this opinion by here discussing the evidence on this point. It is sufficient to say that purchasers for such property were not numerous, the sale was advertised and open, it was postponed in hope of securing bidders, the minimum price was fixed, and at an open sale the appellee Holcomb made his bid. It is true that the price bid was much less than the cost of the property, but it was all it would bring at an open sale, and, in view of the past failures of this new enterprise, may be said to be equal to the then value of the property. We find no evidence of fraud or bad faith in the transaction. What was done was authorized by the circumstances, and was done in good faith, and for the best interests of all concerned.1

Judgment affirmed.

GUERNSEY v. COOK.

1876. 120 Mass. 501.

Colt, J. The contract declared on has been held to be the personal contract of the defendant. 117 Mass. 548. It provided in substance on the part of the defendant and Mr. Beebe, who together owned a majority of the stock of the India Company, that the plaintiff should be made treasurer of that company at a stipulated salary; the plaintiff on his part agreeing to take part of their stock at par, with an agreement that it should be taken back and an allowance made for interest, in case it should be desirable for any reason to dispense with the plaintiff's service as treasurer." The question is whether such a contract is void as being against public policy. Its decision depends upon the construction which must be fairly given to the terms of the contract.

In consideration of the purchase of a part of their stock at a price named, two of the stockholders agree to secure to the purchaser the treasurership of the corporation, of which they are members, and to secure to him also a sum named, as the annual salary of the office. The purchase of the defendant's stock and the agreement relating to the office are incorporated into the contract as part of one transaction; and each agreement is the valuable consideration of the other. The contract, if reasonably susceptible of two meanings, one legal and the other not, must indeed receive an interpretation which will support rather than defeat it, and the presumption is in favor of its legality.

¹ But see Reilly v. Oglebay, A. D. 1884, 25 West Virginia, 36; and Chicago Hansom Cab Co. v. Yerkes, A. D. 1892, 141 Illinois, 320. — Ed.

But this contract necessarily implies that the defendant intended to derive, and the plaintiff intended to give to him, a private advantage, not shared by the other stockholders, in consideration of his election as treasurer. And there is nothing in the facts disclosed at the trial to show that such was not in fact the result of the transaction, or that the agreement in question was known and consented to by the other members of the corporation.

It was the purpose and effect of the contract to influence the defendant, in the decision of a question affecting the private rights of others, by considerations foreign to those rights. The promisee was placed under direct inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence, which required him to look only to the best interests of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates.

In Fuller v. Dame, 18 Pick. 472, a contract was held to be contrary to public policy, and to open, upright and fair dealing, which tended injuriously to affect the interest of the corporations of which the promisee was a member. It was compared to the case of a composition deed where all the creditors release the common debtor upon the payment of a certain percentage, and where a stipulation for a separate and distinct advantage is held to be a fraud on other creditors and Case v. Gerrish, 15 Pick. 49. Upon the same principle, agreements not to bid against each other at a public auction, as well as agreements for the employment of underbidders and puffers, are held to be a fraud upon the bidders at the sale, and void as against public 4 So contracts with brokers or agents, upon a consideration founded on violations of duty to the principal, are void. Smith v. Townsend, 109 Mass. 500. Phippen v. Stickney, 3 Met. 384. Gibbs v. Smith, 115 Mass. 592. Curtis v. Aspinwall, 114 Mass. 187. also Waldo v. Martin, 4 B. & C. 319; Marshall v. Baltimore & Ohio Railroad, 16 How. 314; Elliott v. Richardson, L. R. 5 C. P. 744.

Upon the facts disclosed, this action, which is not in avoidance but in direct affirmance of the contract, cannot be maintained. White v. Franklin Bank, 22 Pick. 181. The objection that the contract is illegal, although it comes with no good grace from the defendant, is allowed to prevail, not as a protection to him, but for the sake of the public good, and because the court will not lend its aid to enforce an illegal contract. Myers v. Meinrath, 101 Mass. 366. Taylor v. Chester, L. R. 4 Q. B. 309.

Judgment for the defendant.

J. G. Abbott & B. Dean, for the plaintiff.

B. F. Butler & J. A. Gillis, for the defendant.

- won

CHAPTER XII.

POWER OF MAJORITY OF STOCKHOLDERS.1

DUDLEY v. KENTUCKY HIGH SCHOOL.

1873. 9 Bush (Ky.), 576.

Cradock & Trabue, for appellant.

Ira Julian, for appellee.2

Lindsay, J. The order from which this appeal is prosecuted must be regarded as final. The special demurrer to the jurisdiction of the court was sustained, and a judgment rendered against appellant for the costs of the entire proceeding. This is equivalent to dismissing the petition for the want of jurisdiction in the court, and effectually precludes appellant from taking further steps in this litigation to obtain the relief desired.

We are inclined to differ with the circuit court as to its want of jurisdiction to enjoin the collection of so much of appellant's subscription to the high-school as had not been reduced to a judgment in the Franklin Quarterly Court; but this question need not be considered in view of the fact that we feel satisfied, after a careful examination of the petition, that it sets out no cause of action, and that under the facts as presented, and the provisions of the act of the General Assembly incorporating the high-school, it cannot be so amended as to present a cause of action.

The object of the corporation was to establish and maintain a high-school, and not to make money, and it has no legal right to engage in speculations or investments in real estate for the last named purpose; but it has the expressly delegated power "to receive and hold for the benefit of said high-school any lands, tenements, etc., . . by gift, devise, donation, contract, or purchase." It is not complained that the house and lands purchased or about to be purchased from Gaines are not to be held for the benefit of the school, but that the corporation is unable to pay the contemplated price, and that the inevitable result of the purchase, if consummated, will be the bankruptcy of the corporation and the failure of the project to establish the school.

¹ This subject is also discussed in various cases which are given under special topics treated of in subsequent chapters; especially in the cases relating to the stockholder's right to maintain suit, the cases relating to the reserved power of the legislature to alter or amend charters, and the cases on *ultra vires*.—ED.

² Citations of counsel omitted. - ED.

It may be conceded that the facts stated in the petition fully authorize this conclusion, and yet it does not follow that a court of equity has the power at the suit of a stockholder to interfere by injunction to prevent the corporation from executing a contract it has the lawful right to make.

It is true that a majority of stockholders, no matter how great, have not the right to divert the funds of a joint-stock incorporated company to any other than the purposes for which it was organized; and if such funds are about to be so diverted, a stockholder may file a bill in equity against the company to restrain it by injunction from such diversion or misapplication. Bagshaw v. Eastern Counties Railway Co. (7 Hare, 114; 1 Beavan, 1); Marsh v. Eastern Railway Co. (40 N. H. 548). But relief will not be granted unless the corporation is about to do some act outside of the scope of its authority, or in disobedience to the provisions of its constitution, for so long as it exercises the powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders.

Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation. Angell and Ames on Corporations, sec. 393. Nor does the irregular manner in which the board of directors voted upon the proposition to make the purchase from Gaines authorize the chancellor to interpose to prevent its consummation. In the case of Foss v. Harbottle (2 Hare, 461), where the object of the bill in equity was to obtain relief against what was alleged to be a fraud committed by certain of the directors in an incorporated company, which fraud consisted in the sale to themselves. as representatives of the company, of lands in which they were individually interested, Vice-Chancellor Wigram held that although the act might be voidable by the company, yet, inasmuch as a majority of the proprietors might at a general meeting confirm it, he declined to interfere, saying, "While the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit." So in this case, while it may be that the corporation has the right to avoid the purchase from Gaines, because one of the directors, without whose vote the proposition would have been rejected was allowed to vote by proxy, yet it may be that Dudley is the only stockholder who disapproves of the purchase, and it might result that, at the time the court was protecting him against the payment of his subscription because of the unauthor ized action of the directors, a majority of the stockholders in general meeting might ratify or have already ratified the purchase, and bound Dudley under his contract of subscription to submit to their will 'hus regularly and legally expressed.

It may be that the price agreed to be paid for the house and lands is greatly more than its value, but about this matter the opinion of the majority of the stockholders as expressed through the directory must control, and so far as the action of the court in this case is concerned it is immaterial whether the corporation acted wisely or unwisely in contracting a debt which possibly it will be unable to pay. The charter empowers it to make purchases of land, to contract debts, and to issue bonds to an amount not over two thirds of the stock subscribed; and if these powers are so exercised as to result in loss to the stockholders, it is a misfortune against which the courts can afford no protection.

Judgment affirmed.

NATUSCH v. IRVING ET ALS.

1824. Gow on Partnership, Appendix No. VI. Page 398.1

PLAINTIFF, on behalf of himself and all others the shareholders, members, or partners of the Alliance British and Foreign Life and Fire Assurance Company, filed this bill against the president and directors, praying, inter alia, for an injunction to restrain them from carrying on the business of marine insurance in the name or on the account of the company, and from applying the capital of the company to any such purpose.

The case made by the bill and affidavits was, in part, as follows:

A prospectus was issued for the formation of an unincorporated company to grant fire and life insurance, with a capital of five million pounds divided into fifty thousand shares, plaintiff subscribed for fifteen shares, paid the required deposit, insured his life in the company and paid the insurance premium. He was willing also to execute a proper deed of settlement. After the plaintiff had subscribed, &c., the majority of the company undertook to carry on the additional business of marine insurance. They prepared a deed of settlement which contained provisions for enabling the company to carry on marine insurance; and which plaintiff refused to execute. Plaintiff objected to the company's carrying on a marine insurance business. The directors informed plaintiff that, if he was dissatisfied with the course intended to be pursued, he might receive back his deposit with interest, and also have his life policy cancelled and the premium returned.

LORD ELDON, CHANCELLOR.

¹ Statement abridged. Part of opinion omitted. The case was first reported in Gow, and has since been reported in 2 Cooper, Tempore Cottenham, 358.—Ep.

3. An offer is made to the plaintiff that he may receive back his deposit with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by compelling them to retire upon such terms, so to form a new company. This would, as to partnerships, be a most dangerous doctrine. Where a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means and assets of the partnership existing at the time of the dissolution as beneficially as may be for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him, to whom they have given an offer of his deposit and interest, Take that, and we are a new company, keeping the effects, means, assets, and property of the old, as the property of the new partnership.

4. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to

engage in.

5. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares.

If six persons joined in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent.

But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have acquiesced in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners, so engaged, in difficulties and embarrassments, unless they were permitted to proceed in the farther execution of such projects, if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the festinum remedium of injunction.

It may be taken that the principle that would apply to the partnership of six, will apply to this partnership of 600 or 700; 340 have executed in respect of not quite half the number of shares: there probably may be therefore 600 or 700 members. To those who have not had occasion to observe the boldness of speculation, it may seem astonishing that persons, and so many in number, should have engaged themselves in a speculation so little explained, and undertaken to execute deeds, of the contents of which they had so little information. To those who know the difficulty of applying the rules of law and equity to societies constituted of such numbers of persons not incorporated, it is not matter of surprise that persons, ignorant of those difficulties, should become members of such societies; it may be matter of surprise to them that persons who know the difficulty of applying those rules should become members, even where the nature of the speculation is clearly explained, and full information is given of the contents of the deeds to be executed. Much has been done with respect to the difficulty alluded to, by provisions how those who have demands upon such societies are to sue, and how such societies are to be sued; much remains to be done, and particularly as to rendering simple and effectual the remedies of the members of such societies against each other. It is observed that the members of this society underwriting will be each liable to the bankrupt laws. That depends upon the act of parliament which is to take effect in May next. Shares may devolve to feme coverts, infants, &c.: but whatever are the difficulties, courts must struggle to remedy them, and to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a court would act upon in the case of a partnership of six must, as far as the nature of things will admit, be applied to a partnership of 600.

The injunction was granted.

^{1 5} Geo. 4, c. 98, s. 2, by which an underwriter is declared to be a trader liable to the bankrupt laws, and see 6 Geo. 4, c. 16, s. 2. Formerly it was held that an underwriter, merely in that character, could not be a bankrupt. Ex parte Bell, 15 Vesey, 355.

ASHTON v. BURBANK.

1873. 2 Dillon, 435.1

Suit on a note given for an assessment upon stock in a corporation Original charter authorized company to transact a "life and accident insurance" business. After defendant's subscription to the stock, the charter was amended, the name was changed, and the corporation was authorized to transact the business of "fire, marine, and inland insurance."

The amended charter was accepted, but in point of fact the corporation took no risks during the short period it afterwards did business except such as were authorized by its original charter. The defendant neither procured nor assented to the amendatory act, nor did he know of it until after its passage, and thereupon he protested against it and refused to pay the note on this ground. The note was sold to plaintiff by the insurance company after it ceased to do business, and long after the note was due.

DILLON, J.

3. The change in the charter, by which a life and accident com-

pany was authorized to transact fire, marine, and inland insurance, is an organic change of such a radical character as to discharge previous subscribers to the stock of the company from any obligation to pay their subscription, unless the change is expressly or impliedly assented to by them. Here there was no such assent, and no acquiescence in the structural change made in the charter of the company. The company could not, against such a subscriber, maintain a suit to collect his subscription, and take the money and use it as capital for the transaction of business under the charter as altered. We think, in such a case, the subscriber is not bound to enjoin action under the amended charter, but may, if he elects, defend against an action to recover on his subscription to the stock. If the company accepted the amended charter, as it did by adopting a new name, it is not essential to such a defence to show that at the time of the trial the corporation had actually exercised the enlarged powers conferred upon it. The defendants are not bound, on their subscription, to pay to the company money which, if paid, may be used as capital to carry on the business authorized by the amended charter.

Judgment for the defendants.

Nelson, J., concurs.

¹ Statement abridged. Only so much of the case and of the opinion given as relates to one point. - ED.

HARTFORD AND N. H. R. CO. v. CROSWELL.

1843. 5 Hill (N. Y.), 383.

Assumpsit, tried at the New-York circuit in March, 1841, before GRIDLEY, C. Judge. The action was brought to recover certain instalments upon the defendant's subscription to the capital stock of the plaintiffs' company. On the trial the case was this: In May, 1833, the legislature of Connecticut passed an act authorizing the plaintiffs to construct a rail-road from the town of Hartford to the city of New-Haven. The capital stock was divided into shares of \$100 each, and the defendant subscribed for and was allowed 10 shares. The subscription was in these words: "Whereas the general assembly of the state of Connecticut, at their session in May, 1833, passed a resolution incorporating the Hartford and New-Haven Rail-Road Company, with power to construct a rail-road or way from the town of Hartford to the city of New-Haven: We do hereby subscribe to the stock of said company the number of shares annexed to our names respectively, on the terms, conditions and limitations mentioned in said resolution. New-York, July 31, 1835." In May, 1839, the legislature of Connecticut amended the act of incorporation by authorizing the company to "procure, charter or purchase and hold " such number of steamboats, to be used in connection with their road, as they might deem expedient, to an amount not exceeding \$200,000; and, for that purpose, to increase their capital stock to the same amount. On the 2d of July following, the board of directors resolved to accept the amendment, and to adopt it as a part of the charter. They also resolved that the stockholders who were paying up their instalments should be allowed a preference in the distribution of the new stock to be created in pursuance of the amendment. In September, 1839, at a general meeting of the stockholders, the resolution to accept the amendment was ratified. Due notice of this meeting was given; but the defendant was not present, nor did it appear that he had at any time signified his assent to an acceptance of the amendment. Intermediate the date of the defendant's subscription and the amendment of the charter, the instalments sought to be recovered were regularly called for by public notice to that effect, and a personal demand thereof was shown to have been made of the defendant, who refused to pay. The road was completed and put in operation before the commencement of the suit. Upon these facts a verdict was rendered for the plaintiffs by consent, subject to the opinion of the court upon a case.

- S. P. Staples, for the plaintiffs.
- C. Mc Vean, for the defendant.

By the Court, Nelson, Ch. J. The main objection taken to a recovery in this case is, that the plaintiffs are seeking to enforce the performance of a different contract from that into which the defendant

entered when he subscribed for the stock; in other words, that the defendant never assented to the contract upon which the action is founded.

The original charter conferred upon the company all the usual and necessary powers for locating and constructing a railroad from the town of Hartford to the city of New-Haven. The ten shares subscribed for by the defendant were expressly taken upon "the terms, conditions and limitations" mentioned in the charter. And such would doubtless have been the legal effect of the subscription had no reference to the charter been made in it. The contract thus entered into was as specific and definite as the charter of the company could make it; and the meaning and intent of the parties cannot therefore be mistaken. It was a contract to take stock in an association incorporated for a particular object, having such limited and well defined powers as were necessary to the accomplishment of that object. The defendant assented to the object by his subscription, and thereby agreed that his interest should be subject to the direction and control of the powers thus expressly conferred, but nothing more.

Since entering into this contract, the plaintiffs have procured an amendment of their charter, by which they have superadded to their original undertaking, a new and very different enterprise—and, for aught that can be known, a very hazardous one—with the necessary additional powers to carry it into effect. Instead of confining their operations to the construction and management of their rail-road between Hartford and New-Haven, they have undertaken to establish and maintain a line of water communication by means of steamboats, at an expense not to exceed \$200,000; to all which, it is insisted, the contract of the defendant has become subject, without his approbation or assent.

It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract entered into with them by the several corporators, there is no limit to which it may not be carried short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment. Corporations possess no such power. Indeed they can exercise no powers over the corporators beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent. This is so in the case of private associations, where the articles entered into and subscribed by the members are regarded as the fundamental law or constitution of the society, which can only be changed by the unanimous voice of the stockholders. (Livingston v. Lynch, 4 John. Ch. Rep. 573; Coll. On Part. 641.) So here, the original charter is the fundamental law of the association - the constitution which prescribes limits to the directors, officers and agents of the company not only, but to the action of the corporate body itself - and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished

or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent.

The question has been the subject of consideration in Massachusetts and Pennsylvania, and in each the courts have not hesitated to maintain the inviolability of the contract as originally entered into, denying to the company the power of altering it essentially and of binding the subscribers who have not given their assent. In the case of The Middlesex Turnpike Corporation v. Locke, (8 Mass. Rep. 268,) the suit was brought upon a subscription contract for stock, by which the defendant agreed to take one share and to pay all assessments made upon it. The ground of defence which prevailed was, that the location of the turnpike road had been changed by an act of the legislature; after the defendant's subscription, the act having been passed at the instance of the corporation; and that the defendant had never assented to the alteration. The court said: "The plaintiffs rely on an express contract, and were bound to prove it as they allege it. Here the proof is of an engagement to pay assessments for making a turnpike in a certain specified direction. The defendant may truly say, non heec in fædera veni. He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto." The same principle was recognized and admitted in the case of The Indiana & Ebensburgh Turnpike Co. v. Phillips, (2 Penn. Rep. 184.)

I do not deny that alterations may be made in the charter by the procurement of the company, without changing the contract so essentially as to absolve the subscriber. Such would be the case, perhaps, in respect to mere formal amendments, or those which are clearly enough beneficial, or at least not prejudicial to his interests. A modification of the grant may frequently be advisable, if not necessary, in order to facilitate the execution of the very object for which the company was originally established; and I admit there are intrinsic difficulties in the way of laying down any general rules by which to distinguish between the two kinds of cases. Each must depend upon its own circumstances, and be disposed of with due regard to the inviolability belonging to all private contracts.

Some of the cases which have occurred exemplify the difficulties attending the question. In Irvin v. The Turnpike Co., (2 Penn. Rep. 466,) it was held that a benefit which results to individual property by the location of the road, did not, in contemplation of law, enter into the consideration of the contract of subscription. Hence, it was there decided that the subscriber was bound, notwithstanding a change in the location of the road made by an act of the legislature against his remonstrance; and this though the change was obviously to his prejudice in point of fact. The decision, it will be perceived, is contrary to the case before referred to in Massachusetts. The court, moreover, were not unanimous, Rogers and Kennedy, Js. having dissented. In Gray v. The Monongahela Navigation Co., (2 Watts & Serg. 156,)

the same learned court held, that an alteration in the charter, by which additional privileges were granted to the corporation, was not such a violation of the contract of subscription as would relieve the subscriber, although the additional privileges might extend the liabilities of the company and thus incidentally affect him.

I refer to the last two cases as affording a very full and able examination of the subject, without intending, at this time, to assent to their conclusions or to all the reasonings of the learned chief justice who delivered the opinions. In each of them, however, the general principle before asserted in *The Indiana & Ebensb. Turnpike Co. v. Phillips* is recognized, viz. that the alteration by the legislature may be so extensive and radical as to work a dissolution of the contract; but an effort is made so to modify and regulate the application of the principle as to admit of improvements in the charter, useful to the public and beneficial to the company, without this consequence.

In the case before us, the change in the powers and purposes of the plaintiffs' company has been so extensive as to preclude us from sanctioning a recovery upon the defendant's subscription, unless we are prepared entirely to abandon the principle above stated and to declare that the interests of subscribers shall be subject to the will and pleasure of a majority of the stockholders.

Judgment for the defendant.

STEVENS v. RUTLAND & BURLINGTON R. CO.

1851. 29 Vermont, 545.1

BILL IN CHANCERY, preferred before the Chancellor of the Third Judicial Circuit, against the Rutland & Burlington Railroad Company and three of its directors, by a stockholder; the object of which is to obtain an injunction, restraining defendants from using the corporate funds or credit for the purpose of constructing a railroad from Burlington to Swanton. The original charter authorizes the building of a railroad from Burlington in a southerly and southeasterly direction to a point on the Connecticut River. It provides that the capital shall be one million dollars; with the right in the corporation to increase it to an amount sufficient to complete said road and furnish all necessary apparatus for conveyance. The corporation was organized, the stock taken, and the road constructed and put in operation. The plaintiff subscribed, and paid for, five shares; and is still the owner of the same. After the plaintiff had become a stockholder, and after the road was in operation, the legislature passed an additional act, authorizing the corporation to extend its railroad from Burlington northerly to Swanton, a distance of about thirty miles; also providing that the

¹ Statement abridged. Portions of opinion omitted. - En

corporation, in the construction of this extension, shall have all the rights and privileges and be subject to all the liabilities contained in the original charter. This additional act was accepted by the board of directors. The directors caused a meeting of the stockholders to be called, to see if they would accept of this act as an amendment of their charter; and threatened, in case of acceptance, to apply the corporate funds in constructing the extension against the will of the minority and particularly of the plaintiff. After the bill was filed, and prior to the hearing, the meeting was held, and a majority of the stockholders voted to accept the additional act as an amendment of their charter. The defendants filed no affidavits, nor did they apply for a delay of the hearing for the purpose of answering the bill.

Bennett, Chancellor. The question is, can the orator, upon such a state of facts, claim, at the hands of the chancellor, his injunction.

It is an admitted principle, that in partnerships, and joint stock associations, they cannot by a vote of the majority change or alter their fundamental articles of copartnership or association, against the will of the minority, however small, unless there is an express or implied provision in the articles themselves that they may do it. It is equally well settled, that a court of chancery will, upon the application of an individual member of a partnership, or joint stock association, restrain, by injunction, the majority from using the funds or pledging the credit of the partnership or association in a business not warranted, and not within the scope of their fundamental articles of agreement. Courts of equity treat such proceedings by a majority, as a fraud upon the other members, which they will neither sanction or permit. To prevent the commission of fraud, by injunction, has been one of the earliest and most appropriate heads of equity jurisdiction, as well as to relieve against it, when committed.

It was well conceded, in the argument on the defense, that if the corporation had been about to proceed to a construction of the contemplated extension without the act of 1850, it would have been a proper case for an injunction. The only question which can be open to debate is, as to what shall be the effect of the act of 1850, and a subsequent adoption of the act by the corporation, upon the individual rights of a shareholder who does not assent to its adoption? If bound by it, there is no equity in this bill. It is, and must be admitted, that the legislature has no constitutional power, unless it be reserved in the grant, to change or alter an act of incorporation without consent, and thereby cast upon the company new and additional obligations, or take from them rights guaranteed under the original charter. And indeed this the legislature have not attempted to do. It is also equally true that it is a part of the law of corporations, that they act according to the voice of the majority. But it is to be remembered, that this is not a suit in which the plaintiff seeks to protect himself in any corporate right, but in his own individual right, growing out of the fact of his having become a corporator by his subscription and its payment, to the

capital stock of the company. One of an aggregate corporation may contract with the company, as well as a third person; and the rights of the individual so contracting are no more distinct and independent in the one case than in the other. The plaintiff, by his subscription, assumed to pay to the corporation, and only for the purpose specified in the charter, its amount, according to the assessments; and there was at the same time a trust created, and an implied assumption on the part of the corporation, to apply it to that object, and none other. The corporation also assumed upon themselves to account to this corporator for his share of the dividends, when this road should be completed and put in operation, and for his share of capital stock, though not in numero. The charter, in this case, gives to the state the right to purchase out the road of the corporation, after a given number of years, upon certain terms therein specified. The relation between each original shareholder and the corporation is the same. The obligation of the contract between the legislature and the corporation, after an acceptance of the charter, is no more sacred than that which is created between the corporation and the individual corporator. Does any one suppose the legislature could, without the consent of parties, absolve a corporator from liability on his subscription to the corporation, or modify it? and can they do the reverse of it?

It is conceded that there is a class of alterations in a charter, which the corporation may obtain and adopt, that would not so essentially change the contract as to absolve the corporator from his subscription, or give him a right to complain in a court of justice, in case he had previously paid it. Where the object of the modification or alteration of the charter is auxiliary to the original object of it, and designed to enable the corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the original corporator cannot complain; and I should apprehend it would make no difference with the rights of a corporation, in such a case, though he could show that the charter, as amended, was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator, I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules, and votes of the company, and there is an implied assent, on his part, with the corporation, that they may apply for, and adopt such amendments as are within the scope, and designed to promote the execution of the original purpose; and he signs, and the corporation receive his subscription, subject to such implied contingency; and if we regard it in the nature of a license, only, it would not alter the principle. parties having acted upon it, it would not be countermandable.

But suppose the object of the alteration is a fundamental change in the original purpose, and designed to superadd to it something which is beyond and aside of it; does the same principle apply? [After citing and commenting on various cases, the last of which is Hartford & N. H. R. Co. v. Croswell, 5 Hill, 385, the learned Chancellor proceeds: Chief Justice Nelson, in his opinion, lays down this general proposition, "that corporations can exercise no power over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent."

This is a sound proposition. The consent or assent may, however, be implied in a class of cases, as has already been stated, where the amendment is not regarded as fundamental, and can be brought within the scope of the original purpose of the association; and this is going to the very verge of the powers of the corporation. It is difficult, and would be unwise, to attempt to lay down any general rules to determine in what precise cases the assent of the corporator should be implied, and in what not. It is sufficient for the present purpose to say, that his assent cannot be implied, in a case like the present, from a majority vote. Courts may differ, and doubtless will, in regard to what alterations shall be sufficient to constitute a fundamental change. the present case, I think, on this point there can be but one opinion. The termini of the road, as fixed by the charter, are Burlington, and some point on the west bank of Connecticut River, in the county of Windsor or Windham. The capital stock is one million of dollars, with a right in the corporation to increase it to an amount sufficient to complete said road, and furnish the necessary apparatus for conveyance, The supplementary act of 1850 purports to authorize the corporation, within three years, to construct and extend their railroad from the terminus in Burlington, to some point in Swanton, in the county of Franklin, a distance of about thirty miles; and the act provides that ' in the construction of the road, they shall have all the rights and privileges, and be subject to all the liabilities, contained in their original charter, and the acts in addition to it.

The franchise granted to this company was territorial; and an extension of the termini necessarily is an extension of the franchise. It cannot remain the same thing in substance, until it can be established that a part is equal to the whole. Besides, the company may increase the capital stock to such additional sum as shall be necessary to construct the extension.

The statute of 1850 is little less in effect, if anything, than an attempt to create in a summary manner, and by the way of reference, a new corporation, and to transfer all the old corporators to it. If all the corporators had assented to this transfer, it was well enough. The change in the purpose was not more fundamental in the case from the 5th of Hill than in this. It is not necessary that the business should be changed in kind, to change the original purpose. If this is not a change in purpose, it would not be to extend the road in one direction to Canada line, and in the other to Massachusetts line; and there would be no limits to the control which the corporation might acquire over the individual corporators, and this, too, without their consent, except what arises from the confines of legislative authority.

The change, then, in the charter being fundamental and the corporation not being able to bind the plaintiff by a majority vote, what must be the result? If he had been sued for an assessment upon his stock, he might have claimed that he was absolved from all liability upon the acceptance of the amendment. And is not this reasonable? Shall it be said that the legislature and the corporation have power to embark this corporator in a speculation to which he has never consented? If it can be done in one case it can in another. But having paid his funds into the corporation, he has a right in chancery to compel a faithful performance of the trust by the corporation, in conformity to the original charter, and to keep them within its purview. No one can suppose that upon the payment of his subscription, the personal identity of the plaintiff was merged in the corporation, or that he ceased to have distinct and independent rights. In Rex v. Eastern Counties Railway Company, 1 Eng. Railway Cases 509, the King's Bench issued a mandamus, upon the application of a minority, against the company, directing them to proceed in the construction of a railroad which had been chartered between two points, the corporation having stopped short of one of the termini, and voted to go no further.

In the case before us, it must follow, if the plaintiff is not bound by the conjoined effect of the act of 1850, and a majority vote of the corporation, the defendants can stand on no better ground, than a voluntary association, who are about to go beyond and aside of their original articles, against the will of a minority. This, in effect, was conceded in the argument. There was nothing improper in the passage of the act of 1850, though upon the application of a portion of the directors of the company, as stated in the bill. No attempt is made by the legislature to impair the obligation of any contract between themselves and the corporation, or to cast upon the company any new and additional burthens without their consent. There was no attempt to impair any contract arising under the prior charter, between the corporation and the corporator as an individual, or disturb any vested right in either. The act is not mandatory; and there is, in fact, an implied condition annexed to it, that it is to be accepted by all whose individual and corporate interests are to be affected by it, before it shall become operative. But suppose this act had been mandatory upon the corporation and the several stockholders, to build this extension in the road within three years; would not all cry out against its palpable injustice? Suppose, instead of this, the legislature had left it optional with the corporation to accept or reject the act of 1850, and had provided, that in case of the acceptance of the amendment by the corporation, it should bind the corporators who dissented from it, or did not assent to it, and this too, in their individual rights; would there not be the same reason to cry out against it? Would it not, by its carrying a stockholder into an enterprise which he had never consented to, and changing the principles of liability between the corporation and the andividual corporator from what they were under the original compact,

Impair and disturb vested rights under it? I have no hesitation in saying, that, in my opinion, it would be beyond the pale of the constitutional authority of the legislature.

In Ellis v. Marshall, 2 Mass. 269, it was held that no man could be made, by act of legislation, a member of an aggregate corporation without his personal consent; and the same principle would seem to apply when he is asked to remain and become a corporator under a supplementary act, to be attached to and become a part of the charter, where that which it is proposed to superadd is vital, and constitutes a fundamental change in the charter, which is but the constitution of the company.

[The learned Chancellor here discussed various authorities, including Ware v. Grand Junction Water Co., 2 Russell and Mylne, 461. In reference to this case, he said (inter alia):

"I apprehend, that the views expressed by the Lord Chancellor in that case, if sound, must rest upon one of two grounds; either that the change asked for in the charter was not a fundamental one, or else upon the ground of the transcendent powers of a British parliament. . . . It is evident that Lord Brougham . . . grounds himself upon the sovereign and uncontrollable powers of the parliament. . . . But with us, no legislature can transcend the bounds of the constitution."

The Rutland and Burlington Railroad Company is but a private corporation, so far as the stockholders are concerned; though as it regards the powers of the legislature to authorize the taking of private property for public use, it may be said to be a qua public corporation. The stock is owned by individuals who compose the corporation, and from which they design to derive a profit; and they manage the business in view to their own interest; and it does not become a public corporation because the public interests may be incidentally promoted by it. In principle it is like a turnpike, a canal, or bridge charter: Ten Euck v. Delaware and Raritan Canal Company, 3 Harr. (N. J.) 200. I think it is obvious beyond a reasonable doubt, upon principle and authority, that the plaintiff is not bound in his individual rights as a corporator, by force of the act of 1850 and the majority vote of the corporation, without his individual assent. In the case of public corporations, as in towns, counties, &c., a different rule may obtain. The distinction between private and public associations and corporations has been well settled since the days of Lord COKE. (Coke Little. 181, b.)

In case of public associations and corporations the public good requires that the voice of the majority should govern, and hence the power is more favorably expounded than when created for private purposes; and it would seem that public convenience required the adoption of such a rule. But in case of private associations and corporations it is not the doctrine that a majority can bind the minority in a matter beyond and aside of their original articles of association,

or charter of incorporation, unless it be by special agreement giving such power, which must be a part of the original association.

If, in a case like the present, the majority cannot bind the minority, it is plain that there is an equity in this bill, and that the defendants can stand in no better situation than if they had, by a vote of the company, proceeded to build the extension, and to apply the funds and credit of the corporation to that purpose, without any additional act of the legislature.

This doctrine of Lord Chancellor Eldon [in Natusch v. Irving] necessarily grows out of the doctrine that it is the business of courts of justice to enforce the contracts of parties, not to make them. To give to courts not only the power to enforce, but also the power to make, or even modify in one iota a contract fairly made, would be the rankest despotism.

The ground assumed is, that this corporation had the funds of the original stockholders for an object distinctly defined in the original charter, and that they cannot be allowed to apply them to any other purpose whatever, without the consent of the stockholders, and that to do it would be a breach of trust.

In regard to the expediency of bringing this bill, the chancellor cannot, and has no right to judge. The orator has the constitutional and sole right of determining this matter; and if he thinks it expedient, we must acquiesce in it; and no plea of the public good or inequality of interests involved can justify the chancellor in denying to the orator a right which is clearly accorded to him by well established chancery principles. The public good is best promoted by an impartial administration of justice according to the right of the case; and courts cannot measure the equality or inequality of interests in the litigant parties and make that a basis for a decision, notwithstanding what has been urged in the argument.

Where it is clearly shown that a corporation is about to exceed its powers, and to apply their funds or credit to some object beyond their authority, it would, if the purpose of the corporation was carried out, constitute a breach of trust; and a court of equity cannot refuse to give relief by injunction. See Agar v. The Regent's Canal Company, Cooper's Eq. 77; The River Dun Navigation Company v. North Midland Railway Company, 1 Eng. Railway Cases 153-4.

It cannot justify the chancellor in refusing to exercise the jurisdiction of chancery because the defendants may claim the right to proceed under color of the act of 1850. It is a settled principle that the circumstance of the defendant's acting under color of law, simply, can form no justification. The question, after all, will be: does the law justify the act which is being done, or threatened to be done? Osborn v. The Bank of the United States, 9 Wheaton, 738. If a law is unconstitutional it can give no authority. If the power it confers is abused or exceeded, the person acting under the color of law is a

wrong doer. In the case at bar the corporation had no power to build the extension under their original charter; and the act of 1850 is not binding upon the orator without his consent.

The injunction must therefore be allowed, but only so far as to restrain the defendants until the further order of the chancellor from applying the present funds of the corporation, or their income from the present road, either directly or indirectly to the purpose of building said extension in said road, or to pay land damages and other expenses which may be contingent upon the building of it; and also from using or pledging, directly or indirectly, the credit of the corporation in effecting the object of the extension; and at the same time the company will be left at liberty to build the extension with any new funds which they may see fit to obtain for that specific object.

Though this is but an interlocutory decree, made upon the plaintiff's equitable rights as disclosed in the bill, still it having been twice argued, and it being a case of considerable interest and importance, I have deemed it proper to publish, somewhat at length, the grounds of my opinion. "To err is human;" and if, upon more mature consideration, the conclusion of my own mind shall be found to be unsound, and not in accordance with principle and authority, I rejoice that they may be corrected by a superior tribunal.

After the above decision was announced, and before the injunction was issued, the defendants proposed to file bonds to indemnify the plaintiff against all damages which he might sustain by reason of the extension; upon which the chancellor suggested, that he did not deem it competent for him to make contracts for the parties; and that upon the authority of the case of *Natusch* v. *Irving et al.*, it could make no difference, if filed, in the result.²

1 The case was not carried to a higher court. - ED.

² In Forrester v. Boston & Montana, &c. Co., A. D. 1898, 21 Montana, 544, the minority stockholders of a Montana corporation sought to enjoin the ratification of a transfer of the entire corporate property to a foreign corporation, in consideration of the latter corporation delivering its entire stock to the former corporation and assuming all its liabilities. By the agreement of transfer, the stockholders in the Montana corporation, who did not choose to accept shares in the foreign corporation in exchange for their present shares, were entitled to receive from the foreign corporation \$170 for each share not exchanged.

Upon the hearing of the order to show cause why an injunction pendente lite should not issue, the defendants offered a bond in the penal sum of \$50,000, conditioned, in substance, that if the defendants shall, when requested by plaintiffs, purchase from them the 200 shares owned by plaintiffs at the market price thereof and pay any damages that might be sustained by them because of any action that might be taken at the meeting of the stockholders called to ratify the transfer, the obligation should be void, but otherwise to be in force. The defendants further offered to execute a bond in such form, or with such conditions, in such amount, and with such sureties, as the court might designate, in lieu of the bond so offered, if it were deemed in any wise insufficient. The District Court declined to accept such bond, and granted the injunction order. The defendants appealed from the order granting the injunction. The opinion on this branch of the case was as follows:

PIGOTT, J., pp. 551, 552. "The court did not err in refusing to accept the bond or undertaking tendered by defendants. See Cook, Stock & S. § 502; Stevens v. Railroad Co., 29 Vt. 545; Railroad Co. v. Collins, 40 Ga. 582; Tomkinson v. Railway Co., 35 Ch. Div. 675; Thomp. Corp. § 345. Section 876 of the Code of Civil Procedure confers upon the court a discretionary power to vacate an injunction granted ad interim or pendente lite, where the alleged wrong or injury is reparable and capable of being adequately compensated.

PHILLIPS v. PROVIDENCE STEAM ENGINE CO.

1899. 21 Rhode Island, 302.

BILL IN EQUITY to restrain a sale of the property of a corporation, ordered by a vote of the majority of the stockholders, brought by a minority stockholder. The facts are stated in the opinion. Heard on bill, answer, and replication. Bill dismissed.

STINESS, J. The complainant, a stockholder, seeks to restrain the respondent corporation from disposing of its property. The company is doing business under an extension by its creditors, in the terms of which an installment becomes due in November next. It is agreed that this cannot be met, and that the company will be unable to go on in business because the creditors refuse a further extension. In view of these facts, an arrangement has been made to form a new company, in which creditors holding extension notes will take preferred stock to the extent of one-half of their claims, while other subscribers will furnish enough cash to pay for the plant and provide a working capital. The terms of the proposed sale give to the present stockholders \$70,000 over and above the indebtedness of the company, amounting to about \$228,000, making a total payment of about \$298,000. The estimates of the value of the property vary from \$327,000 to \$397,000, the latter being the complainant's estimate; but it does not appear that either party has reason to expect that either sum would be realized at a forced sale. This is not a sale in which the other stockholders are to gain any advantage beyond the privilege, which is also offered to the complainant, of taking his proportionate amount of cash or its equivalent stock in the new company, as he may prefer.

It is in effect a cash sale to strangers, approved by stockholders representing 3,675 shares against 75 held by the complainant. While this majority cannot affect any rights to which he is entitled, it tends to show a fair price. It is a well-known result, to which courts of justice cannot be blind, that large plants of this kind are often, if not sated for in money, upon defendant's executing such an undertaking as the court may require. We do not think the court abused its discretion. As counsel well say, if plaintiffs were clearly entitled to an injunction in this case, the district court would not have been justified in accepting an undertaking in lieu of the injunction, which would be licensing the commission of a wrong not susceptible to compensatory damages. Although the present value of the shares held by plaintiffs may be accurately determined by a judgment, and the profits by way of future dividends on their shares that might accrue from the Montana Company predicted with approach to reasonable certainty, yet, if the transfer and the vote of the shareholders in attempted ratification thereof be ultra vires as to them. then it is manifest, upon the plainest principles of law, that no court may rightly compel them to dispose of their shares in invito. Tomkinson v. Railway Co., supra, Beach. Inj. §§ 295, 296; Mills v. Railway Co., supra. If, as matter of law, the proposed transfer was shown to be ultra vires the corporation, plaintiffs were entitled, as of right, to the injunction; and in such event, were a bond accepted and injunction refused, the fact would seem apparent that the court had decided that plaintiffs' property could not be taken without their consent, and at the same time had permitted it to be done, - an inconsistency need ing no comment." - ED.

usually, sold at a great sacrifice in case of a forced sale. We should not have to go outside of the records of our own court to find proof of this fact. A sale being necessary, the question is how shall it be made. The prayer of the bill is that a receiver may be appointed; that the business may be wound up and the company dissolved; and the argument is that the sale of the effects should be at public auction.

The question, then, is whether the complainant is entitled to such a decree.

There is a difference of opinion as to the power of a corporation to sell its entire property and thus practically to retire from business. Some courts hold that it may be done by the consent of all the stockholders (Am. & Eng. Ency. L. 2 ed. vol. 7, p. 734, note 1), and others hold that it may be done by a majority. Ditto, notes 2, 3, and 4. All of the authorities cited in note 1, however, do not hold that the consent of all the stockholders is necessary, e. g. Treadwell v. Salisbury, 7 Gray, 393; Wilson v. Miers, 100 Eng. Com. Law, 248, et al. But the editor adds: "There seems to be no doubt that it may do so when it is no longer able to profitably continue its business."

We think that this is the correct rule. It has been recognized in this State. Hodges v. N. E. Screw Co., 1 R. I. 312, 350. In Wilson v. Prop'rs Central Bridge, 9 R. I. 590, Brayton, C. J., said: "No case has been cited, and, in view of the diligence of counsel in this case. we may say there is no case which holds that where the purpose of the incorporation could not be accomplished, the business contemplated could not be carried on; where the capital had been exhausted in endeavors to go on, having no means to go further; a company thus laboring under burdens which they could no longer bear, could not release themselves by a surrender of their franchise to the State which granted and which was willing to receive it, and that by a majority. This is not only for their benefit, but it is a necessity, and it would be hard indeed if one stockholder could by his dissent prevent such relief against the prayer of all other members of the company." Peabody v. Westerly Water Works, 20 R. I. 176, a necessary limitation to this rule was recognized in the words: "The action of the company was taken by a vote of more than 1,100 out of a total of 1,350 shares. There is no proof of unfairness, oppression, or fraud in such action. The case as presented is simply that of a stockholder who differs from a large majority of his fellow stockholders as to the expediency of a sale."

The principle upon which these cases rest is that a corporation may dispose of its property by a majority vote, in cases which are free from unfairness, oppression, and fraud. Against wrongs of this kind equity will interfere. To this effect are Lauman v. Lebanon R. R., 30 Pa. St. 42; Treadwell v. Salisbury, 7 Gray, 393; Leathers v. Janney, 41 La. Ann. 1120; Sewell v. East Cape May Co., 50 N. J. Eq. 717; Sargent v. Webster, 13 Met. 497; Warfield v. Marshall, 72 Ia. 666; Wilson v. Miers, 100 Eng. Com. Law, 348; see also Miner's Ditch Co. v. Zellerbach, 37 Cal. 543.

The complainant does not charge improper conduct, but simply that he considers the price inadequate and unjust; and hence he prays for a receiver and a sale of the property by auction. Ordinarily when a court orders a sale it can only be done by auction. A court cannot negotiate a private sale, and it orders an auction as the fairest chance for all parties to bid and buy. But when the parties in interest have negotiated a sale which is fair to all concerned, and there is nothing to show that a larger price may reasonably be expected, it does not follow that an auction sale would be ordered. This question was considered in Quidnick Co. v. Chafee, 13 R. I. 402, in which the trustee had an offer for the entire property, approved by nearly all the creditors. Then other parties intervened, agreeing to bid the amount named at auction, and the court ordered a sale by auction. In the present case there is no evidence that anybody is willing to give as much as the offer proposed, or that there is any reason to suppose that it will bring as much or more. The only testimony put in by the complainant is that the tools will probably bring more than they are valued at by the company, while as to the bulk of the property, the real estate, &c., there is no evidence of market value. Moreover, the complainant does not show that he desires to bid upon the property himself, or that he knows of any one who would bid at a sale. In this absence of evidence that a larger total might be expected from an auction sale we see no reason to disturb the agreement already made, which, upon the testimony given, seems to be fair.

The complainant relies strongly on Mason v. Pewabic Co., 133 U. S. 50. In that case the court had appointed a master to value the property, which he reported to be nearly \$500,000. A majority of the company had arranged a sale to themselves at \$50,000. Naturally, in view of such gross inadequacy, the court ordered a sale by auction. The case was very different in its details from the case before us.

In Wilson v. Prop'rs Central Bridge, 9 R. I. 590, the city of Providence had control of the corporation and had sold the corporate property to itself. The court restrained the city from taking possession and ordered a sale by auction. That, too, was a different case from this one.

The court is bound to look to the interests of all parties, and especially to protect the rights of a minority from oppression and fraud. But where, as in this case, no such thing is charged, and nothing is shown to lead to the belief of a better total price, the complainant makes no case for interference. To show that movable tools may be sold at a price somewhat, but not largely, higher than that at which they are scheduled, is quite a different thing from showing that the plant as a whole would sell for more than the price offered. To set aside the sale under these circumstances would be to risk a certainty for an uncertainty, without any testimony on which to base a hope of benefit to the stockholders from such interference. We see no reason for such a step in the dark.

Bill dismissed.

ELYTON LAND CO. v. DOWDELL.

1896. 113 Alabama, 177.1

BILL in equity filed by Annie Dowdell, the owner of five shares in the Elyton Land Company, for the purpose of annulling a conveyance of its property by that corporation to the Elyton Company, and also of annulling a mortgage executed by the latter company to secure certain bonds.

Some years before the conveyance the Elyton Land Company having on hand, as profits, a large amount of notes, had issued dividend certificates to the amount of \$1200 per share. These certificates had subsequently been paid for in bonds of the company, denominated "Dividend Trust Bonds." The plaintiff had disposed of her bonds. Her rights as a bondholder are not involved in this litigation, but only her rights as a shareholder.

The Elyton Land Company, under its charter and amendments, was authorized to buy land and sell lots; to borrow and lend money; to guaranty indebtedness; to build, rent, lease, and use buildings; to issue bonds in amount not to exceed five millions of dollars; and to take stock in other corporations.

In 1893, the Elyton Company was incorporated, with authority to engage in many enterprises not included in the original or amended charter of the Elyton Land Co. The fourth section of the act incorporating the Elyton Co. enacts, "that said corporation may purchase the property, real, personal, and mixed, of the Elyton Land Company: provided that such sale is made under the laws now in force, and nothing in this act shall be construed to impair or in any manner whatsoever to affect the rights of any stockholder of the Elyton Land Company."...

At a regular meeting of the stockholders of the Elyton Land Company, a majority of the stockholders voted to sell its entire assets to the Elyton Company. The terms of the sale were, that the Elyton Company should pay all the liabilities of the Elyton Land Company; and issue \$2,500,000 bonds, \$1,796,000 of which were to be issued to the holders of the dividend trust bonds in payment thereof; and in addition issue 10 shares of its stock to each holder of 1 share of stock in the Elyton Land Co. Thereupon the Elyton Land Company transferred all its property to the Elyton Company. The latter issued the bonds provided for, and executed a mortgage to secure them. The stipulated amount of stock was also issued, and was delivered to such of the stockholders as were willing to receive it in exchange for the stock held by them in the Elyton Land Company. No other arrangement or provision was made to pay the stockholder in the Elyton Land Company for his share, except to accept the stock in the Elyton

¹ Statement abridged. Arguments omitted. -ED.

Company. It is alleged in the bill, and not traversed in the plea, that complainant was not present, was not represented, and had no notice of the meeting of the directors of the Elyton Land Company at which it was resolved to sell its property to the Elyton Company. Immediately after the consummation of the transaction between the two corporations, complainant filed her bill.

To the bill, the respondent filed a plea and answer in support of the plea. The plea set forth the history of the "Dividend Trust Bonds;" alleged that they were valid obligations of the Elyton Land Company; and that the plaintiff, having accepted her proportion of the bonds with full knowledge of the facts, is estopped to deny that they are binding obligations of the Elyton Land Company.

The court ruled that the plea was insufficient as a defense to the bill. Appeal.

Alex. T. London, and Tompkins & Troy, for appellants. Gordon Macdonald and Smith & Weatherley, contra.

COLEMAN, J. [After stating the case.] . . .

. . . We do not doubt the right of complainant to relief, so far as the defense is rested upon the plea. In the first place, by its charter, The Elyton Company was authorized to purchase the property of The Elyton Land Company, "provided that such sale is made under the laws now in force, and nothing in this act shall be construed to impair, or in any manner whatsoever to affect the rights of any stockholder of The Elyton Land Company." At the time of the sale and transfer of its property, The Elyton Land Company was solvent, a going corporation, and its stock was very valuable. Its duties and powers were fixed by its charter, and its business evidently managed with great skill and success, for the benefit of its shareholders. The Elyton Company by its charter was authorized to engage in many enterprises not within the scope of the powers of The Elyton Land Company. A shareholder in the latter might not be willing to become a shareholder in the other. By the sale and transfer of the property, The Elyton Land Company divested itself of all its property and capacity to continue the business for which it was organized. If the sale stands, the owner of stock in The Elyton Land Company is compelled to accept the stock of the new corporation, or hold stock in a corporation without capital assets. We lay no stress on the argument, that by its amended charter, The Elyton Land Company is authorized "to take stock" in other corporations. It was certainly never intended by that provision, to authorize The Elyton Land Company to effect its own dissolution by a sale of all its assets. and "take the stock" of another company in payment for distribution to the shareholders or any shareholder, without the consent and contrary to the preference of the shareholder. But it is too clear for argument, that the two million shares of stock of The Elyton Company were to be issued to The Elyton Land Company, as a mere conduit to the shareholder of The Elyton Land Company, and not to

be held and owned as capital assets of The Elyton Land Company. It may be that a private business corporation may sell out its entire property by and with the consent of less than all its stockholders, for the purposes of paying its debts, or for the purposes of dissolution and settlement, but when this is the purpose, it must be clearly understood, and the terms and conditions of the sale must be within the contractual relations between the corporation and its creditors or shareholders. There can be no presumption that a creditor or stockholder of the dissolved corporation will accept in payment of his demand, anything but money. He cannot be required to do so arbitrarily. While the plea shows the consent and ratification of the complainant to the issue of the certificate of twelve hundred dollars to the shareholder for each share of stock, and its subsequent payment by a dividend bond, it does not show consent or ratification of the sale of the property and the execution of the mortgage. It is manifest that the whole plan of organization of The Elyton Company, was in the interest of those who held the dividend bonds, without reference to the interest of the stockholder. These bonds at first maturing within three or four years were a lien or charge only upon \$2,400,000 of its promissory notes, leaving all its other property unincumbered. By the arrangement, the dividend bonds, amounting to only \$1,796,000, secured by a lien upon \$2,400,000 of notes, were converted into gold bonds, running thirty years, and were secured by a mortgage upon all the property-owned by The Elyton Land Company. The bonded indebtedness was increased over a half million dollars. The Elyton Company, from the pleading, did not own a dollar of capital other than that acquired by the purchase from The Elyton Land Company.

The facts set up in the plea do not present an estoppel as to the complainant whatever may be their effect upon the dividend bondholders, and the other stockholders, who aided in carrying out the arrangement, or have since ratified it. — Kean v. Johnson, 9 N.-J. Eq. 401; N. O. &c. R. R. Co. v. Harris, 27 Miss. 517.

Decree of City Court affirmed.

MORRIS v. ELYTON LAND CO. et al.

1899. 125 Alabama, 263.1

Bill in equity, by Mrs. Susie M. Morris, a stockholder in the Elyton Land Company, brought for the same purpose as the bill in *Elyton Land Co. v. Dowdell, supra*, p. 466. The plaintiff was an infant at the time of the transactions complained of.

1 Only so much of the report is given as relates to a single point. Arguments smitted, — Ed.

Plaintiff applied for the appointment of a receiver.

On the submission of the cause upon the application for a receiver, the chancellor decreed that the transaction assailed by the bill was not binding as to the complainant who was a non-assenting shareholder of the Elyton Land Company, but that the relief to which she was entitled was the payment of the value of her shares of stock in said Elyton Land Company; and he directed that the respondents pay into the court \$12,000 to await the final hearing of the cause, to be held as security for the satisfaction of the final decree; further decreeing that unless they did so within the time named, a receiver would be appointed without further notice. The required deposit was made, and thereafter the chancellor entered a decree denying the appointment of a receiver, and refusing to extend to this cause the existing receivership in cause No. 2104, which was pending in the same court. From this decree the complainant appeals, and assigns the rendition thereof as error.

Cabaniss & Weakley, for appellant.

Alex. T. London, and Thomas G. Jones, contra.

PER CURIAM. [After reaffirming the decision in Elyton Land Co.

v. Dowdell, 113 Ala. 177; supra, p. 466.]

We think there can be no doubt of the proposition, that a court of chancery can and will undo an act, which is ultra vires, as well as prevent the same by injunction. There is an equity of rescission as well as of prevention. 2 Spelling on Corp. § 615; City of Chicago v. Cameron, 120 Ill. 447; City of Knoxville v. R. R. Co., supra; Byrne's Case, 65 Conn. 336; Elyton Land Co. v. Dowdell, supra.

The shareholder's suit, when brought, is for the benefit of the corporation and all shareholders. It is not the suit of the shareholder for his individual interest. The relief granted is the same, as if the corporation sued. — 4 Thompson, Corp., § 4491; 2 Pomeroy's Eq., § 1095; 1 Morawetz, Corp., § 262; Mount v. Radford Trust Co. et al.,

5 Am. & Eng. Corp. Cases (N. s.), 92.

It would necessarily and logically follow from this principle that a moneyed compensation to the complaining shareholder for the value of his stock could not against his objection be decreed as his relief. To do so would be nothing more nor less than compelling the shareholder to sell his stock, which a court of equity has not the power to do. That it would be to the benefit of the corporation and all other shareholders in it, to let the transaction stand and compel the dissentient to accept compensation for his stock, is an argument that rests upon no higher grounds than that of expediency. In the administration of justice by the courts, principle should never be sacrificed at the altar of expediency. — Forrester v. Boston & Montana, &c., Co., supra; Kean v. Johnston, supra; Mills v. R. R. Co., supra; Stevens v. R. R. Co. et al., 29 Vt. 545.

The application for a receiver was heard on the bill as amended

and exhibits, and answers of respondents, and upon affidavits filed in support of the bill and answers. Upon the undisputed facts in the case, we are of the opinion that the application for a receiver should have been granted, and that the receivership in cause No. 2104 pending in said chancery court should have been extended to this cause. From the action taken by the chancery court, it is evident that the chancellor was of the opinion that upon the facts the complainant was entitled to a receiver in the absence of a deposit by the respondents with the register of the court of \$12,000 as a security for the complainant by way of compensation for her stock in the event of her recovery upon a final hearing. But in this alternative provision, the learned chancellor misconceived the character of the complainant's suit as well as the nature of relief to which she was entitled. For the suit, though brought in her name, was in legal contemplation and effect a suit by the corporation, and the relief, if any had, would be a recovery for the corporation. That the case is a proper one for the extension of the receivership upon the conceded facts is shown by the following authorities: Beach on Receivers, §§ 88, 789; Gluck & Becker on Receivers, 42, § 16; High on Receivers, § 292; Ala. Nat. Bank v. Mary Lee C. & R. Co., 108 Ala. 288; Bridgeport Dev. Co. v. Tritsch, 110 Ala. 274; Scott v. Ware, 65 Ala. 174; Stevens v. Davison, 18 Gratt. 819; Ponca Mill Co. v. Mikesell, 8 Am. & Eng. Corp. Cases, (N. s.), 740.

The decree of the chancery court is reversed and the cause remanded.

BARTHOLOMEW v. DERBY RUBBER CO. et al.

1897. 69 Connecticut, 521.1

Surr by minority stockholders of a manufacturing corporation, to compel the surrender and cancellation of a lease of its plant to Loewenthal. The directors voted to make the lease, and gave notice of a special stockholders' meeting to confirm their action. The action of the directors was approved by all the stockholders present at the meeting.

The term of the lease thus confirmed was for one year, with a privilege upon the part of the lessee to renew the lease from year to year, for a period not exceeding nine years, upon the same rent and conditions. The lease also provided that at the expiration of any year the lessee might purchase the property if he chose, at a price to be determined upon by an appraisal made in conformity to the mode therein designated.

Other facts are stated in the opinion.

The respondents demurred to the complaint.

1 Statement abridged. Arguments omitted. - ED.

Edwin B. Gager and Wm. S. Downs, for the respondents Loewenthal et al.

V. Munger, for the petitioners.

Andrews, C. J. The plaintiffs are a minority of the stockholders of the Derby Rubber Company. They ask that a certain contract called a lease, between the said company and the other defendants, be set aside and declared to be void. The record shows that this contract was made by the directors of the company; that it was, before delivery, submitted to a meeting of the stockholders duly called for that purpose, and that by a unanimous vote of the stockholders present at that meeting and holding a majority of all the stock, it was affirmed and ratified. The plaintiffs, although duly notified of said meeting and the purposes for which it was to be held, voluntarily remained away.

If the contract was really ultra vires of the corporation, the plaintiffs may claim that it should be set aside. The contract contains an option to the lessee to become the purchaser of the property at a price to be fixed by a sort of arbitration. The complaint avers that it is the intention of the directors and the majority stockholders, in case the option is used, to divide the money received among all the stockholders and wind up the affairs of the corporation. As a conditional contract to sell the property, this agreement is not questioned; nor could it well be questioned. It is competent for any business corporation to sell its property, pay its debts, divide its assets and wind up its affairs. Especially is this so if the corporation is in an embarrassed condition. It is as a lease for ten years without a sale, that the contract is said to be ultra vires. We speak of the contract hereafter as a lease. The sole question then is: Was the vote ratifying the lease, and so the lease itself, ultra vires and void?

We are inclined to think the lease was not void. The lessee is to continue the same business which the corporation was organized to carry on. The lease, therefore, is not a change in the business, but only a change in the management of the business. The financial condition of the corporation is now depressed, and its business cannot be made profitable under its own management, for want of capital. Additional capital is not available. But neither the directors nor the majority stockholders have so far lost confidence in the concern as to be willing peremptorily to wind up its affairs. The lease was entered into as the best, perhaps the only, means of carrying the corporation over this period of depression, and in the meantime obtaining some income for the stockholders. If a sale takes place it is certain that the property will be worth more in operation than if left idle. Such leases have repeatedly been sustained by the courts of equity.

The case of Featherstonhaugh v. Lee Moor Porcelain Clay Co., L. R. 1 Eq. 318, 326, was like the one in hand, in this: Minority stockholders asked to have a lease of the entire property of the corporation set aside. That company was incorporated for "the working, pre-

paration, and sale of porcelain clay," with power to combine "mining operations" with the original business. After a period of unsuccessful working, a majority of the stockholders voted to and did lease the whole of the works and buildings of the company for the period of twenty-one years. It was held that this was a valid lease, not beyond the power of the company to make. The Vice-Chancellor, SIR WIL-LIAM PAGE WOOD, in giving the opinion, said: "It appears to me that I should be controlling improperly the effect of this deed, if I did not allow this company to do that act which through the medium of their directors they have done. . . . Have the company by this act which they intend to carry into effect, . . . either on the one hand abandoned their purposes, . . . or on the other hand, exceeded their purposes? Have they done either one or the other? It appears to me they have not abandoned the purposes of the company. They have granted a lease for twenty-one years, and, so far, they have agreed to take a rent for their property instead of working it themselves, and taking the profit. At the end of twenty-one years they are to have the whole of the property back, and, as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case), they would have it back in a more profitable condition. . . . They have not exceeded their powers, because nobody can contend that parting with their property for a certain time is exceeding their powers, beyond this, that during all that time they are not carrying on the business. But, as to that view, I apprehend that it is perfectly competent for a meeting (i. e., of the stockholders) to say: 'China clay is in a very depressed state — the market is very bad — and we agree it is better not to work it for two or three years.' That would be entirely within their functions, and they would not be said, in that respect, to have abandoned their work, or to have exceeded the functions allowed them." The bill was dismissed with costs.

In Simpson v. Westminster Palace Hotel Co., 8 H. L. Cas. 712, 718, a company was established "for the erection, finishing, and maintenance of a hotel, . . . and the doing all such things as are incidental or otherwise conducive to the attainment of" that object. The directors of the company let, for a stipulated period of five years, to the head of a government department for the business of his office, a large part of the hotel. There was evidence that this use would be advantageous to the company in its intended business. This, too, was a bill by minority stockholders asking that the lease might be declared invalid. It was held that the arrangement was valid. In the House of Lords, the Lord Chancellor (LORD CAMPBELL) said: "From the large rent immediately to be received by the company for the occupation of the one hundred and sixty-nine rooms by the India Board; from the monopoly to be enjoyed by the company in supplying so many persons with refreshments; and from the fashionable reputation to be conferred on the hotel by this association, the opinion expressed by the majority of the stockholders, that the arrangement is beneficial

to them, is likely to be verified. This anticipation would not be sufficient if the original undertaking had been abandoned, or if there was any extension of the original undertaking; but as there is neither abandonment nor extension of the original undertaking, and the arrangement may assist instead of obstructing the prosecution of the original undertaking, I must advise your Lordships to affirm the decree appealed against."

In Temple Grove Seminary v. Cramer, 98 N. Y. 121, a company incorporated as an academy, or seminary of learning, was held not to have exceeded its powers by leasing one of its buildings during the vacations for a boarding-house. See also Lafond v. Deems, 81 N. Y. 507. In Brown v. Winnisimmet Co., 11 Allen, 326, a company chartered as a ferry company let one of its vessels not needed in its ferry business to be used in another business. This was held not to be an ultra vires contract. See also City Hotel v. Dickinson, 6 Gray, 586; French v. Quincy, 3 Allen, 9; Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315; Calloway Mining, etc., Co. v. Clark, 32 Mo. 305; Watts's Appeal, 78 Pa. St. 370; Dupee v. Boston Water Power Co., 114 Mass. 37.

We have considered this case on the assumption that the action of the directors and the majority stockholders was done in good faith and in the honest belief that they served the best interests of all concerned. If fraud had been charged a very different case would have been presented. Counsel for the plaintiffs says in his brief that the lease was fraudulent on its face. But fraud is not charged in the complaint. Fraud is never to be presumed. While fraud may in some cases be inferred from the facts, it is never to be inferred unless it is charged; and then only where the facts and circumstances indicate clearly that fraud has been committed.

The Superior Court is advised that the complaint is insufficient, and to sustain the demurrer.

In this opinion the other judges concurred.1

1 "The remaining errors complained of ... may be considered together, namely, that the directors of the corporation, plaintiffs, had no power to make the lease sued on. It is supposed that a company chartered for the purpose of manufacturing and refining oil cannot lease its entire property, and so defeat the very purpose for which its charter was granted. But corporations, unless expressly restrained by the act which establishes them, or some other act of assembly, have, and always have had, an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property. Hence an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter. Dana v. Bank of United States, 5 Watts & Serg. 223. If they can alienate absolutely, they may lease, which is but a partial or temporary alienation. Omne majus continet in se minus."

SHARSWOOD, J., in Ardesco Oil Co. v. North American &c. Co., A. d. 1870, 66 Pa. State, 375, pp. 381, 382. — Ed.

PARSONS v. TACOMA SMELTING AND REFINING CO.

1901. Supreme Court of Washington, 65 Pacific Reporter, 765.1

APPELLANT Parsons, original plaintiff, brings suit as a stock-holder of the Tacoma Smelting and Refining Company against the corporation and its trustees, and the Tacoma Smelting Company. Parsons and certain other stockholders who have intervened and united with him as plaintiffs, pray for the cancellation of a lease executed by the Tacoma Smelting and Refining Company to the Tacoma Smelting Company.

The Tacoma Smelting and Refining Company was incorporated in 1887. It purchased a smelting plant and carried on business. In 1898, a proposition to lease all its plant and properties to a new corporation, called Tacoma Smelting Company, was submitted by the trustees to a meeting of the stockholders, and was then approved by a majority of all the stockholders. Before this meeting a majority of the stock in the old corporation had been purchased by the new corporation; and a large portion of this stock, represented by Rust as trustee, was voted on at the stockholders' meeting.

A lease for ten years was executed Dec. 6, 1898. It included all the properties, smelting plant, buildings, machinery, and all property of every description, whether real, personal, or mixed, belonging to the Tacoma Smelting and Refining Company, and also included a provision for purchasing all ore and finished products and supplies then on hand, at its market value, to be thereafter inventoried and appraised, and for which \$30,000 was afterwards paid in settlement of the lessor's liabilities. The lessee also covenanted that within six months it would expend at least \$30,000 in making improvements and betterments on the smelting plant; that it would pay \$5,000 per annum rental, together with taxes, insure the property, and at the end of the term return the property in as good condition, wear and tear excepted, as when received.

At the time of executing the lease, the old corporation owed about \$50,000 for borrowed money, and it had no funds on hand. Other facts as to the condition of the old corporation are stated in the opinion.

Reavis, C. J. [After stating the facts; and holding that there was not a legal quorum of trustees present at the meeting of the board when a resolution was adopted in favor of leasing the property.]

The objects of the incorporation of the Tacoma Smelting & Refining Company are stated in its articles to be the building, acquiring, owning, and constructing and operating of works and buildings for the purpose of milling, reducing, smelting, and refining gold and silver ores, purchasing and handling of such ores, advancing moneys

 $^{{\}bf 1}$ Statement abridged from opinion. Only so much of the report is given as relates to a single point. — Ep.

thereon, and acquiring, purchasing, owning, and operating of such appliances and adjuncts as may be necessary or convenient for the prosecution of the business; the purchasing, owning, and acquiring of mines and all other lands that may be necessary or convenient in operating said business; and generally to do all other acts which, in the judgment of the trustees, may be proper or essential to the successful carrying on of the purposes and objects of the corporation. It is apparent that no express power to lease all the property of the corporation is contained in the articles. The articles of incorporation, as observed, are a contract. Each individual stockholder assumed the liability of the payment of his subscription to the capital stock in money or money's worth, and the corporation engages to carry on the business for which it is organized. Its business is managed by the board of trustees, but always within the fundamental limitations of the articles of incorporation. . . . The stockholders have equal rights to participate in the profits of the business according to the value of the stock owned by each, and each stockholder is entitled to the protection of his charter rights. He may insist that the business be conducted according to the articles; and, while the wishes of the majority of the stockholders are potent in the administration of all the business of the corporation, and, where exercised without fraud or oppression, are controlling upon the minority, yet the action of the majority cannot prevail where it impairs the contract right of a stockholder. The reasons urged for the necessity of the lease in question are that the Tacoma Smelting & Refining Company was unable to procure capital to conduct its business efficiently; that it had liabilities which were pressing, and had no available funds to make payment. It may be well to suggest an inquiry into the condition of the corporation at the time the proposal to lease the property was made. It had a plant of considerable value. It apparently exceeded in value the liabilities, and, while the amount is not definitely shown, it appears that a large portion of the subscriptions to the capital stock had not been paid. Mr. Rust testified that some of the subscribers to the capital stock had been requested to advance capital to conduct the business, but that no such advancements had been made. It is nowhere intimated that the board of trustees had attempted to exercise its appropriate powers to collect the unpaid subscriptions to the capital stock. In fact, it would seem, from the reasons suggested in the resolution adopted by the majority of the stockholders, that they did not desire this capital stock to be drawn upon in the prosecution of the corporate business. It cannot be concluded from the record before us whether other action by the board of trustees might not keep the corporation a going concern, and enable it to perform the objects of its organization. It may be implied from the testimony that a cogent reason for the action of the trustees was the enlargement of the smelting business by the organization of a new corporation, which should include within it the promoters and members of several large mining companies, so that the

product of those mines could be brought to the smelter, and a much larger business established. The promoters of the new corporation and of the lease evidently desired to secure control of the stock in the old company. The acceptance of the lease seems to have been upon condition that the new company acquire a majority of the stock. It is urged that under the circumstances surrounding the transaction the trustees had the power to execute the lease. The authorities cited by counsel for respondents have been examined, and those most pertinent will be considered.

[The learned Judge here commented on Bartholomew v. Rubber Co., 69 Conn. 521; Hennessy v. Muhleman, 57 N. Y. Supp. 854; Ardesco Oil Co. v. North American Oil & Min. Co., 66 Pa. State, 375; and Plant v. Ice Co., 103 Georgia, 666. The opinion then proceeds.]

But, on the other hand, there are well-adjudged cases holding that a lease of all the property of a corporation cannot be made. That the stockholders cannot make such lease is ruled in Copeland v. Gaslight Co., 61 Barb. 60. In Small v. Matrix Co. (Minn.) 47 N. W. 797, the Minneapolis Company leased its property to the Electro Matrix Company to carry on the same business and the lease was ratified by a majority of the stockholders. The court observed: "We do decide that such a surrender of the property, and, so far as possible, of the functions, of a corporation, in order that, while it is to still continue in existence, its business may be carried on by another corporation, to which such transfer is made, would violate the rights of a nonassenting stockholder arising from the contract, implied, if not expressed, in the creation of such an organization, and he would be entitled to have such acts restrained by injunction." The same declaration is made in Black v. Canal Co., 24 N. J. Eq. 455. In Byrne v. Manufacturing Co. (Conn.) 31 Atl. 833, a corporation was organized for the purpose of succeeding to and carrying on the business of an insolvent corporation. The court declared that this could not be done; that such a transfer would be sustained only when the purpose was a bona fide winding up of the business of the existing corporation, and that any dissenting stockholder could maintain an action to enjoin such a disposition of the corporate property. A distinction may be observed between a sale of all the property and a lease of all the property. In that of a sale no further liability rests upon the stockholder. The corporation is in fact discontinued. In that of the lease the business is discontinued, and the profits derived by the lessee, but the stockholders' obligations may continue. Under our statutes the corporate existence is limited in time. This was not usual in the older cases. And, further, section 4275, 1 Ballinger's Ann. Codes & St., contains the complete procedure for the dissolution of the corporation at the will of two-thirds of the stockholders. These statutes apparently contemplate the conduct of the business for which the corporation is organized through its own appointed agencies, or, at the choice of two-thirds of the stockholders, a dissolution. It is true, an insolvent corporation may make an assignment for the benefit of its creditors against the will of a non-consenting stockholder, and probably any appropriate proceedings in equity might be taken to relieve a failing corporation by such disposition of its property as should be equitable, which did not violate any contractual relations of the stockholders. It is concluded upon the whole record presented here that the lease in controversy is voidable at the suit of a non-consenting stockholder.

[It was then held, that the new corporation had no right to purchase shares in the old corporation for the purpose of controlling its

property and business. The opinion concludes.]

It appears that the appellants are entitled to have the lease adjudged void, and, further, that the stock of the Tacoma Smelting & Refining Company owned by the new company shall not be used in voting at stockholders' meetings in the old company. The judgment is reversed, with direction to the superior court to adjudge the lease void, and that it be cancelled, and that the Tacoma Smelting Company be enjoined from voting the stock held by it in the Tacoma Smelting & Refining Company.¹

DUNBAR, FULLERTON, and ANDERS, JJ., concur.

VAN SYCKEL, J., IN BLACK v. DELAWARE AND RARITAN CANAL CO.

1873. 24 New Jersey Equity, 455, pp. 464-466.

[The questions arose upon a bill filed to enjoin the United Companies of New Jersey from executing a lease of their roads and canal to the Pennsylvania Railroad Company for the term of 999 years.]

VAN SYCKEL, J.... The certificate for stock declares that the holder is entitled to a certain number of shares of the capital stock, which consists of the corporeal works and property, with valuable franchises to be used by the corporation for their profit, by the taking of tolls and fares; with the right to acquire and dispose of such

1 "It has been suggested that a power of sale must include the power to exchange, because the greater includes the less; but no such comparison can properly be made, as neither includes the other, and neither is part of the other. In the event of a sale, properly and fairly conducted, whether by public auction, by sealed bids, or by any other method calculated to produce the best result attainable, each of the stockholders has an equal right to become the purchaser of the whole or any part of the corporate assets, each is equally interested in obtaining the highest price for the common property, and each is entitled to an equal pro rata share of the proceeds; but if the holders of any number of shares, however large, be authorized to exchange the corporate assets for the capital stock of a foreign corporation, the law furnishes no measure by which to determine the prudence or wisdom of the exchange or to test the fidelity of those clothed with the power and charged with the duty incident to such proceedings."

PIGOTT, J., in Forrester v. Boston & Montana &c. Co., A. D. 1898, 21 Montana, 544,

р. 562. — Ер.

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property as may be essential in the legitimate exercise of their functions, under the management and control of directors, of which any corporator, by and with the consent of the requisite number of his associates, may be one. The prospect of increased gains, consequent upon the growth of population, and added business, is a valuable incident also to the ownership of the stock. Such are the rights vested in the stockholder under the law and by virtue of his engagement with his associates, before the lease is effected.

After the lease takes effect, his company is denuded of all these corporeal, substantial properties, its structure for the next nine hundred and ninety-nine years is totally altered, and instead of what he before possessed, he would be compelled to accept an annual rent, fixed without his concurrence, and secured by the personal responsibility of the corporate lessee; for pending the term, which is perpetual for all practical purposes according to our allotted years, the visible, tangible assets would be dissipated and decayed. The right of re-entry can scarcely be entitled to the name of security.

The shareholder would still have the paper upon which his certificate is printed, but in place of the earnings, he must be content with a share of the reserved rental in a corporation possessed of the single faculty of maintaining its organization for the distribution of such rent, stripped of all the franchises for the exercise of which it was founded. Without his consent, and against his protest, he would lose his share in the old thing, and be forced, as an unwilling captive, into a new and wholly different venture. A statement of the consequences which necessarily flow from this project, demonstrates the futility of attempting to establish it without legislative consent.

Equity looks at the substance of things, and not at mere names. For all substantial, practical purposes, a lease for nine hundred and ninety-nine years is a conveyance in fee. It would carry us to a period as distant in the future, as the time of Alfred the Great is remote in the past, and if our courts should permit corporations, without legislative authority first had, to make any disposition of their entire franchises that a controlling interest might determine upon, the private rights of minorities would be no more secure against invasion now, than they were in those semi-barbarous days.

It may also be considered as settled, that a corporation cannot lease or dispose of any franchise needful in the performance of its obligations to the state, without legislative consent. Nor is the difficulty avoided by the proposition that a corporate body, by and with the assent of a majority of the corporators, may abandon their business. Even if this was true, upon such dissolution, the franchises could not be transferred, but would revert to the sovereignty from which they were derived, and the shareholders would become partners or joint owners in the assets, and for their share in such assets, they could not be compelled to accept an annual rent for nine hundred and ninety-nine years. . . .

Doe, C. J., in DOW v. NORTHERN R. R. et al.

1887. 67 New Hampshire, 1.

[Upon a bill in equity, by minority stockholders of the Northern Railroad, seeking to enjoin the operation of the Northern Railroad by the Boston & Lowell Railroad under a lease for 99 years, approved by a two-thirds vote of the stockholders.]

Doe, C. J. . . . The lease of the Northern to the Lowell is an attempt to compel the plaintiffs, dissenting stockholders of the Northern, to exchange for ninety-nine years all their interest in the Northern for an annuity, secured by a right of entry, practically equivalent to a mortgage enforceable by strict foreclosure. The possibility of a nonpayment of the annuity, and a resumption of the carrier business by the Northern, has no bearing on the question of the validity of the exchange of that business for the annuity. This question is to be decided on the possibility and the presumption that the Northern will have no occasion to resort to its security. The circumstance that the money to be received by the Northern is divided into many sums, due at different times, is immaterial. The law of the case is what it would be if the price paid for the estate of ninety-nine years had been paid in a single sum before the purchaser took possession of the road, and the security given were merely for the performance of covenants not relating to the payment of the price. The payment of the whole price in one sum, and the division of it among the Northern stockholders, would leave them members of their corporation and owners of an estate in remainder. Instead of being a step in a process of dissolving the Northern company and winding up its affairs, the lease requires that company to "keep up and preserve its organization." Whether each stockholder's share of the price of the estate sold is paid to him in one sum at one time, or in many sums at many times, the sale of the road for ninety-nine years is not a provision for the Northern company's working the road, which by the terms of the sale is to be worked during that time, not by the Northern and the Lowell as joint principals, nor by the Lowell as agent of the Northern, but by the Lowell for the Lowell as sole principal.

As agents, the majority can do whatever is necessary to carry on, for their principal, the principal's business of a common carrier between Concord and Lebanon. Within limits, they can select the mode and means of executing their agency. The lease, instead of being a mode or means of their carrying on that business for their principal, transfers it to another principal for ninety-nine years, and transfers their principal to the vocation of a landlord and rent-receiver, which is not, in kind or degree, the same business as carrying passengers and freight. The legal scope of their employment is within the

bounds of their principal's business, or, at most, those bounds and a proceeding for winding up that business, and dissolving their principal.

The retirement of the Northern company from the industrial activity of common carriers to the leisure of mere rent-receivers was a change in the object of the partnership. The legal character of the change did not depend upon the circumstance that the partnersnever intended to perform all their mental and manual labor in person. The labor now done and the tolls now received on the road are not theirs.

"... Because the corporators may, with the consent of the state, by the vote of a majority or two thirds in interest, abandon their enterprise, sell out their property, and return his share of the proceeds to each stockholder, it does not follow that by the same authority the works may be leased to be carried on and conducted by others, the corporation continuing to exist. The right to elect the directors, by whom the business is to be managed, is a provision in the charter which the state or a majority cannot interfere with; it is a contract. The true question on that point here is, whether the making of this lease and contract is an exercise of the power of managing the business and concerns of the corporation conferred in the charter, such as can be used by consent of a legal majority of corporators, without that of all." Zabriskie, Chancellor, in Black v. Canal Co., 22 N. J. Eq. 130, 407. See, also, 22 N. J. Eq. 405, 408, 415, 416; Zabriskie v. Railroad, 18 N. J. Eq. 183.

By their charter-contract all the stockholders of the Northern Railroad agreed that their partnership business should be the transportation of passengers and freight on their road, including certain incidental enterprises contributing to the transaction of that business. They formed the partnership for no other private purpose than the benefit to be derived from their performance of this contract, legally altered as it may be, under legislative permission, by their express or implied assent. No alteration has authorized a part of the company to suspend the company's performance of the contract by transferring their road and business to other principals for ninety-nine years. The plaintiffs have not acquiesced in the transfer and suspension, but have objected seasonably, and presumably in good faith, for the purpose of protecting their Northern shares. The lease violates the partnership contract, and takes from the plaintiffs an equitable estate of ninetynine years without their consent, and without prepayment of the value of the estate taken. Whatever names are used to designate the trust and agency of the corporate partnership and the relation existing between each stockholder and the company, he has some remedy for their breach of the contract. "Wherever there is a legal right vested in a party, he must, in some court, have the means of enforcing that right." Adley v. Whitstable Co., 19 Ves. Jr. 304, 305.

The private property of the Northern company, subject to a public right of transportation, is held in trust by the corporation for the benefit of the stockholders. The corporation is trustee, holding the legal title. The stockholders are the beneficiaries, holding the equitable interest. "The jurisdiction to enforce performance of trusts arises where property has been conferred upon and accepted by one person on the terms of using it for the benefit of another." Adams Eq. 26. The rule is, that the equitable ownership includes a legal right to a performance of the trust which can be specifically enforced in a court of equity; and the authorities do not recognize a breach of corporate trust as an exception to the rule.

An injunction against the lease as a breach of the Northern trust is. in effect, a decree that the trustee specifically perform the chartercontract and the trust declared in it. In the bill, the plaintiffs ask that the Northern company and their directors be ordered to resume the control, management, and operation of the Northern road. A decree for the plaintiffs, whether affirmative or negative in form, would run against the trustee, — not a mere imaginary person, but the whole body of stockholders, whose performance of their corporate trust is performance of their partnership contract. Whether the plaintiffs' rights, accruing from the contract, are called contractual or fiduciary, they are subject to the general rule that inequitable performance is not specifically enforced when recoverable damages for non-performance are an ample remedy. The equity to compel specific performance of contract arises where an agreement, binding at law, has been infringed, and the remedy at law by damages is inadequate. Adams Eq. 77; Story Eq., ss. 716, 717, 717 α; Fry Spec. Perf., s. 40; Pom. Spec. Perf., s. 3; Southern Express Co. v. Railroad, 99 U. S. 191, 200; Eckstein v. Downing, 64 N. H. 248; Black v. Canal Co., 22 N. J. Eq. 130, 399. But the adequacy of a compensatory suit on a broken contract does not always depend upon the breach being financially injurious to the plaintiff. A breach that would be pecuniarily beneficial to him may be of such a nature in other respects that nothing short of prevention will be just. If the price fixed by a written executory agreement for the sale of a farm is more than the value, that fact is not an answer to a bill brought by the purchaser against the vendor for specific enforcement of the agreement. The purchaser, financially benefited by the violation of his legal right, would be financially injured by resorting to the remedy of a suit for nominal damages. "Compensation in damages, measured by the difference in price as ascertained by the market value and by the contract, has never been regarded in equity as such adequate indemnity for non-fulfilment of a contract for the sale or purchase of land as to justify the refusal of relief in equity." Jones v. Newhall, 115 Mass. 244, 248. The vendor's payment of the difference is not regarded by the law as a full, sufficient reparation for the purchaser who made the contract "on a particular liking to the land." Buxton v. Lister, 3 Atk. 383, 384; Sto. Eq., s. 717. The damage is irreparable in the legal sense.

A written contract of farming partnership may be specifically enforced by an injunction against its violation when a majority of the partners make an unauthorized attempt to turn the whole partnership property and business over to other principals for ninety-nine years in exchange for an annuity or other investment. On the question of equity jurisdiction, the mere expediency of the exchange as a financial measure would be as immaterial as the corporate or unincorporate form of the partnership organization. The recovery of one dollar by an expenditure of one hundred, in a suit at law, would not be a sufficient remedy for a partner objecting to the illegal change of his business. Specific relief would not be less necessary than in the case of a refusal to perform a written agreement for the sale of land.

Performance of the Northern charter-contract would not be rendered inequitable in law by the mere fact of non-performance being more beneficial to the stockholders. The plaintiffs' equitable right to be principals in the common-carrier business between Concord and Vermont, according to their contract, would not be barred by a finding that it would be better for them to exchange that business for the occupation of a lessor, or the business of a road running from Concord to Maine or Massachusetts. They have not agreed that their partners may take them from the stipulated position of principals in the work of carrying passengers and freight between Concord and Lebanon, and give them any other vocation in which a court or jury may think they would be more profitably and judiciously employed. Their expulsion for ninety-nine years from the Northern carrier business, in violation of their partnership contract, is a case in which the general principle of equity gives an injunction, and the evidence shows no exceptional reason for withholding the specific relief necessary to prevent their wrongful exclusion from their chosen employment.

CHAPTER XIII.

STOCKHOLDER'S RIGHT TO INSPECT CORPORATE RECORDS AND PAPERS.

In re STEINWAY'S PETITION.

1899. 159 New York, 250.

[Petition, by Henry W. T. Steinway, for an inspection of the books and records of the Steinway & Sons corporation.

The Appellate Division of the Supreme Court granted the petition, with certain regulations. An appeal was taken from this decision. The facts are stated in the opinion.

Edward C. James and G. W. Cotterill, for appellants.

The method prescribed by the statute creating this corporation, and by the general statutes and rules and practice of the courts, for the examination of the corporate books by a stockholder is exclusive, and is inconsistent with the right claimed in this case to examine the books of account [citing authorities]. The law allows no general right to a stockholder to inspect the books of the corporation. Inspection can only be ordered in aid of a suit brought or defended [authorities]. Assuming that the jurisdiction in cases of this kind is discretionary, that discretion is not arbitrary, but is governed by legal rules, and was not properly exercised by the Appellate Division in this case. . . .

Wheeler $H
ilde{\bullet}$ Peckham and Edward B. Hill, for respondent.

Vann, J. Steinway & Sons, once a copartnership, became a corporation in 1876 under the General Manufacturing Act of 1848, and the relator has been a stockholder therein ever since. He now holds 1,440 shares of its stock of the par value of \$144,000, out of a total of 20,000 shares of the value of \$2,000,000, but with an actual value much in excess of that sum. He has not been an officer of the corporation since 1881, and he has had no means of knowing much about the management of its affairs since 1892, when he was given an opportunity to examine the books. Since then he has been substantially ignorant as to all the details of the management, and has had no

access to the books or records. Learning of certain practices that he considered improper, on April 12th, 1894, and March 27th, 1895, he made protests in writing to the company, but no attention was paid to them. On the 6th of April, 1896, he made a written request for leave to examine the books, but receiving no reply, on the 15th of that month he wrote requesting information, proper in character, upon certain subjects, and to this communication he received an answer from the secretary, dated April 23d, 1896, written in behalf of the board of trustees, virtually refusing the information asked for on the ground that the relator intended to use it in "hostility to the interest of the stockholders." On the 5th of April, 1897, he endeavored to ascertain certain material facts at the annual meeting, but without success, and thereupon he requested the officers and directors to afford his accountants and attorneys access to the books of account, vouchers and records of the company for the years 1892 to 1896, inclusive, for the purpose of examining the same. Receiving no reply, on the 8th of May, 1897, he served a written request upon the treasurer for a statement in writing, under oath, of the affairs of the company, embracing a particular account of all its assets and liabilities for each of the several fiscal years from 1892 to 1896, inclusive, and in response to this he received a general statement placing the assets at more than three millions of dollars, but distributed into only fourteen items, eight of which were over \$100,000 each. The liabilities included but eight items, three of which were the capital stock, the surplus and the profit of 1896. This was the first information as to the company's affairs which the petitioner had been able to obtain in five years, except that he once saw the balance sheet and inventory of January, 1893. Since 1891 the dividends declared by the company have dwindled in amount. In 1896 the dividend was only five per cent, but never before since 1883 had less than ten per cent, and sometimes as much as eighteen and twenty per cent, been divided in dividends.

The relator claimed in his petition for a writ of mandamus to permit inspection of the books, that the officers of the corporation were engaged in an attempt to form an English stock company for the control of its business, with the design of selling their shares of the capital stock, or exchanging them for a much greater amount of shares in the English company, and that efforts had been made by the stockholders and officers to induce him to sell his stock at \$250 a share; but, as he insisted, it was impossible for him to fix upon any price without an opportunity to investigate the condition of the company. He specified various acts which he alleged to be improper on the part of the officers, such as the payment of exorbitant rentals, carrying on a banking business, allowing unusual rates of interest, inventorying the assets too low, and paying the trustees salaries with no equivalent in services.

The opposing affidavits contain a large amount of matter relating to aggravating conduct on the part of the relator in the past, and alleging improper motives and ulterior aims on his part. Many general allegations of the petition were denied in hec verba, without stating the real facts. The president and other officers of the corporation denied the allegations of improper conduct on their part and claimed that the relator wished to force them to buy him out at an extravagant price. As no alternative writ was issued and the relator proceeded to argument upon his petition and the opposing affidavits, his right to a peremptory writ depends upon the conceded facts, the same as if he had demurred to the allegations of the defendants. (People ex rel. City of Buffalo v. N. Y. C. & H. R. R. R. Co., 156 N. Y. 570; Matter of Haebler v. New York Produce Exchange, 149 N. Y. 414; People ex rel. Corrigan v. Mayor, etc., 149 N. Y. 215; People v. R., W. & O. R. R. Co., 103 N. Y. 95; Code Civ. Pro. § 2070.)

While many of the facts alleged in the petition were denied, enough were left undenied to present a case for the exercise of judgment and discretion on the part of the Supreme Court, provided it has power in any case not expressly covered by statute, to authorize the inspection, wholly or in part, of the books of a manufacturing corporation, upon the application of a stockholder.

The Special Term denied the application of the relator for a peremptory writ of mandamus commanding the officers of the corporation to exhibit certain of its books and papers to him, but upon appeal to the Appellate Division the order of the Special Term was reversed by a divided vote, and the prayer of the petition granted, with certain regulations as to the time, place, and manner of exhibiting the books and papers. The Appellate Division allowed an appeal to this court, and certified the following question for decision: "Has the Supreme Court the power, upon the petition of a stockholder, to compel by mandamus the corporation to exhibit its books for his inspection?"

The relator does not claim that the power in question has been conferred upon the court by statute, but he insists that it is a part of its inherent power. This position involves an inquiry into the origin and extent of the authority of the Supreme Court and its power of visitation, or of examining into the affairs of corporations according to the common law.

[The learned Judge held, that the present Supreme Court of New York has all the powers of the English Court of King's Bench and the Court of Chancery as they existed in 1775; except as modified by the State Constitution or Statutes.]

The right of a corporator, who has an interest in common with the other corporators, to inspect the books and papers of the corporation, for a proper purpose and under reasonable circumstances, was recognized by the Courts of King's Bench and Chancery from an early day, and enforced by motion or mandamus, but always with caution so as to prevent abuse. (Rex v. Fraternity of Hostmen, 2 Str. 1223 and note; Gery v. Hopkins, 7 Mod. 129, case 175; Richards v. Pattinson, 1 Barnes' Notes of Cases, 156; Young v. Lynch, 1 Sir W. Blackstone,

27; The King v. Shelley, 3 D. & E. 141; The King v. Babb, 3 D. & E. 579, 580; The King v. Merchant Tailors' Company, 2 B. & A. 115; In re Burton, L. J. [312, B.] 62; In re West Deven Mine, L. R. [27 Ch. Div.] 106.) Lord Kenyon, in rendering judgment in The King v. Babb, assumed "that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation." In Gery v. Hopkins the court, on granting the order to produce, said: "There is great reason for it, for they are books of a public company and kept for public transactions, in which the public are concerned, and the books are the title of buyers of stock by act of Parliament." In Rex v. Fraternity of Hostmen, the reporter states that the court said: "Every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others."

The following cases arose in this state, but the most of them are not strictly in point, as they rest mainly upon statutory authority, which does not extend to the case in hand [citing authorities.]

The courts of other states compel the officers of corporations to allow stockholders to examine the books upon due application for a proper purpose.

In Lewis v. Brainerd (53 Vt. 520) the court said: "The shareholders in a corporation hold the franchise and are the owners of the corporate property, and as such owners they have the right, at common law, to examine and inspect all the books and records of the corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property."

In Huylar v. Cragin Cattle Co. (40 N. J. Eq. 392, 398) it was said: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times, and they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders."

In Commonwealth v. Phænix Iron Co. (105 Pa. St. 111, 116), the rule was laid down that, "unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers and to take minutes from them for a definite and proper purpose at reasonable times. The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders." Upon a second appeal in the same case, sub nom. Phænix Iron Company v.

Commonwealth (113 Pa. St. 563, 572), the court said: "Under the circumstances mentioned for the purposes stated, we are of opinion that according to our ruling when the case was here before, the relator is clearly entitled to an examination of the books and papers of the company. Such a right is, of course, not to be exercised to gratify curiosity, or for speculative purposes, but in good faith and for a specific honest purpose, and where there is a particular matter in dispute involving and affecting seriously the rights of the relator as a stockholder. . . . A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers (the relator) was not bound to accept the mere statement of the board, whether under oath or otherwise, as to the contents of the books, etc. He had a right to a reasonable personal inspection of them, and with the aid of a disinterested expert might make such extracts as were reasonably required in the preparation of the bill he purposed to bring. The relator, we think, has a clear right under the writ and return to the relief he asks, and it is plain that he has no specific legal remedy for the enforcement of that right; and the existence of a supposed equitable remedy is not a ground for refusing the mandamus."

In Cockburn v. Union Bank of Louisiana (13 La. Ann. 289, 290), the court, in granting a mandamus requiring the officers of a corporation to allow access by a stockholder to the books, said: "A stockholder in a corporation possesses all his individual rights except so far as he is deprived of them by the charter or the law of the land: as long then as the charter or the rules and by-laws passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full and can demand to exercise them. It cannot be denied that it is the right of every one to see that his property is well managed and to have access to the proper sources of knowledge in this respect." The same court in a like case declared that a stockholder in a trading corporation "has in the very nature of things, and upon principles of equity, good faith and fair dealing, the right to know how the affairs of the company are conducted, whether the capital of which he has contributed so large a share is being prudently and profitably employed or otherwise. . . . In order to comply with this call and to vote understandingly, it was certainly requisite for the relator to know the condition of the affairs and business operations of the company and be enabled from this knowledge to act for the best interests of the stockholders and of the company." (State of Louisiana v. Bienville Oil Works Co., 24 La. Ann. 204, 208; see, also, Stone v. Kellogg, 46 N. E. Rep. [Ill.] 222; Stettauer v. N. Y. & Scranton Con. Co., 42 N. J. Eq. 46; People v. Walker, 9 Mich. 328; State v. Bergenthal, 72 Wis. 314.)

The elementary works unite in holding that a corporator has the right in question, and that mandamus is a proper remedy. Mr. Wait, in his work on Insolvent Corporations, after reviewing the authorities,

says: "It will be apparent from an examination of these authorities that the rule in favor of a stockholder's right of inspection and investigation of corporate books and papers is becoming very broad and general." (§ 504.) But while the learned author recognizes the rule, he insists, and we agree with him, that an inspection should "not be granted to facilitate speculative schemes or to gratify idle curiosity." He declares that "mandamus is the most complete and effective form of redress available to a stockholder or party in case of a denial of the right of inspection." (§ 516.) Mr. Cook, in discussing the question, says that "the stockholders of a corporation had, at common law, a right to examine, at any reasonable time and for any reasonable purpose, any one or all of the books and records of the corporation. This rule grew out of an analogous rule applicable to public corporations and to ordinary copartnerships, the books of which, by well-established law, are always open to the inspection of members." (2 Cook on Corporations, § 511.)

"The prevailing doctrine in the United States is said to permit an incorporator the same freedom in examining the books of the company as a partner has with respect to the books of his firm, but the right only extends to such documents as are necessary to the stockholder's particular purpose. . . . Statutes giving the shareholders of corporations the right to inspect the corporate books have been passed in many of the American states and in England. These statutes, however, do not supplant the common-law right." (1 Beach on Private Corp. § 75.)

Judge Thompson, in his work on Corporations, says: "One of the privileges incident to ownership of stock in a corporation is that of an inspection of the books and condition of the company, and this privilege, in general, becomes a right when the inspection is sought at proper times and for proper purposes." (§ 4406.) He further declares that when the right is guaranteed by statute the motive for its exercise is immaterial, but when it rests upon the common law it will not be allowed for speculative purposes, the gratification of curiosity, or where its exercise would produce great inconvenience. (§§ 4412–4420.) (See, also, Angell & Ames on Corp. [9th ed.] § 681; Morawetz on Corp. § 473; High's Extraordinary Legal Remedies, § 308; 19 Am. & Eng. Ency. of Law, 231.)

We think that, according to the decided weight of authority, a stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose, and that if this right is refused by the officers in charge a writ of mandamus may issue, in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small, but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute,

nothing is left to the discretion of the court, but the writ should issue as a matter of course, although even then, doubtless, due precautions may be taken as to time and place so as to prevent interruption of business, or other serious inconvenience.

The appellants, however, insist that certain statutory provisions relating to the subject are exclusive, and as they do not extend to the case under consideration, that the Appellate Division had no right to grant the writ. The history of legislation upon the subject in brief is as follows: By the General Manufacturing Act of 1848 it was made the duty of the trustees of corporations organized under it to keep a transfer book, which was required to "be opened for the inspection of stockholders and creditors of the company," substantially every business day at the office of the corporation. (L. 1848, ch. 40, § 25.) This section was subsequently amended so as to require the treasurer to make a statement of the affairs of the company upon the request of persons owning a specified percentage of the capital stock. (L. 1854, ch. 201, § 1; L. 1862, ch. 472, § 1.) The Business Corporations Law of 1875 required the directors of corporations organized thereunder "to cause to be kept at its principal office or place of business, correct books of account of all its business and transactions, and every stockholder in such corporation shall have the right at all reasonable times by himself or his attorney to examine the records and books of account of such corporation." (L. 1875, ch. 611, § 16.) These statutes were all repealed in 1892 by the General Corporation Law. (L. 1892, ch. 687, pp. 1816-1819.) During the same year the Stock Corporation Law was passed, which provides that every stock corporation shall keep a stock book, which "shall be open daily, during business hours, for the inspection of its stockholders and judgment creditors, who may make extracts therefrom." (L. 1892, ch. 688, § 29.) It also requires the treasurer, upon the request of stockholders owning a fixed percentage of the capital stock, to furnish a statement of all its assets and liabilities. (Id. § 52.)

We do not think that the statute now in force is exclusive, or that it has abridged the common-law right of stockholders with reference to the examination of corporate books. By enabling a stockholder to get some information in a new way, it did not impliedly repeal the common-law rule which enabled him to get other information in another way, for the courts do not hold the common law to be repealed by implication, unless the intention is obvious. By simply providing an additional remedy the existing remedy was not taken away. The statute merely strengthened the common-law rule with reference to one part thereof, and left the remainder unaffected. It dealt with but a single book, and as to that it amplified the qualified right previously existing, by making it absolute and extending it to judgment creditors. The stock book has no relation to the business carried on by a corporation, and the change was doubtless made to enable stockholders to promptly learn who are entitled to vote for directors, and judg-

ment creditors to learn who are liable as stockholders for a failure to comply with the provisions of the act. The statute is silent as to the other books, and provides no system of inspection as a substitute for the right of examination at common law. The provision for a report from the treasurer was not designed to take away an old right, but to give a new one, not as a substitute but as an addition.

We think that the common-law right of a stockholder with reference to the inspection of the books of his corporation still exists, unimpaired by legislation; that the Supreme Court has power, in its sound discretion, upon good cause shown, to enforce the right, and that such power is a part of its general jurisdiction as the successor of the courts of the colony of New York, which had the jurisdiction of the Court of King's Bench and the Court of Chancery in England.

It follows that the order appealed from should be affirmed, with costs, and that the question certified should be answered in the affirmative. All concur.

Order affirmed.

CINCINNATI VOLKSBLATT CO. v. HOFFMEISTER.

1900. 62 Ohio State, 189.1

Error to the Superior Court of Cincinnati.

Hoffmeister's petition alleges that he is a stockholder in the Cincinnati Volksblatt Company; that he has requested the corporation to allow him to inspect its books and records and to fix a reasonable time for said inspection; but that the corporation has refused to allow him to inspect the books and records. The petition prays that the defendant be enjoined from refusing to allow him to inspect its books and records. A demurrer having been overruled, the defendant filed an answer; and the petitioner in his reply took issue with new matter alleged in the answer. Upon trial, the court found the issues for the plaintiff; that he is entitled to inspect any of the books and records of the defendant at any reasonable time; and that he may make such inspection by himself, or by agent, bookkeeper or accountant; and may take copies of any of said books and records. Judgment was entered enjoining defendant from preventing the inspection and taking of copies as aforesaid.

Charles W. Baker, for plaintiff in error.

Alfred B. Benedict and Jerome D. Creed, for defendant in error.

Spear, J. [After deciding that plaintiff had not mistaken his remedy.] . . .

2. It being determined that the action was properly brought, and that the court had jurisdiction, is the petition sufficient, or must the

¹ Statement abridged. Arguments omitted. - ED.

plaintiff, before he can have standing in court, set out what his reasons for desiring the inspection asked are, and show that he is actuated by proper motives and in the pursuit of justifiable ends? Such is the contention of plaintiff in error. The statute is, section 3254: "And the books and records of such corporation shall at all reasonable times be open to the inspection of every stockholder." But it is insisted that this provision is not intended to enlarge the right, but is a mere affirmation of the common law rule, and that that rule embodies many conditions, among them that the stockholder must allege and prove that he is acting in good faith. Without stopping to discuss the extent of, and the limitations upon, the rule as established by the common law (for the holdings are at variance upon it), we inquire what reason there is for saying that the intent of the legislature was to merely affirm the common law rule? If that had been all, why take the trouble to legislate on the subject at all? Is it not more reasonable to conclude that the object was to get rid of all uncertainty and of various conditions, whatever they were, and establish the right by a rule, clear, direct, simple, and practically without qualification? The language is plain. The right given is clear. One condition, and one only, is attached, viz.: that the right can be exercised only at reasonable times. Ordinarily the motive, or purpose, of the party who is in the exercise of, or is about to exercise, a clear legal right, is unimportant. Letts v. Kessler, 54 Ohio St. 73, and authorities cited; McDonald v. Smalley, 1 Pet. 620. A like rule prevails as to one's pursuit of an equitable remedy. Morris v. Tuthill, 72 N. Y. 575; Davis v. Flagg, 35 N. J. Eq. 491; Thompson on Corp., sec. 4412, and authorities cited. No reason is apparent why the rule should not apply to the case at bar. We are of the opinion that where a suitor demands the enforcement of a clear right given him by law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation. The petition stated a cause of action and if supported by the evidence warranted the granting of equitable relief.

3. Was the order of the trial court too broad? The finding by the court of all the issues for the plaintiff settles the questions of fact for this court, but it is not improper to add that there was an entire failure to show, on the part of defendant, that the plaintiff was acting from the improper motives charged in the answer, and that the evidence, all of which we have read and considered, fully justifies the finding in favor of the plaintiff. So that, even had the petition been obnoxious to a demurrer in failing to allege a proper purpose for the suit, the defendant, having obtained a full hearing on the charges stated in the answer, would have no ground of complaint on account of the action of the court on the demurrer.

The contention is that whatever right of examination the statute gives is a personal right, and must be exercised by the stockholder in person. Since when, we would inquire, has it been the law that one who has given him a clear right as to property may not exercise it by any proper agent? The proposition has the quality of novelty, but it is not sound. It must be apparent, on reflection, that if so circumscribed a limit were placed on the right, its exercise in many instances would be futile. Foster v. White, 86 Ala. 467; Mitchell v. Rubber Co. (N. J.), 37 Corp. Cases, 42, and notes, and same case in 24 Ap. Rep. 407; State ex rel. v. Bienville Oil Works, 28 La. Ann. 204.

Nor is the right limited to one inspection. It is an incident to ownership of stock, and may be exercised at any reasonable time so long as the relation of stockholder subsists. The right to take copies from the records follows as an incident to the right to inspect. It rests, as does the entire right to examination rest, upon the broad ground that the business of the corporation is not the business of the officers exclusively, but is the business of the stockholders. *Phoenix Iron Company* v. *Commonwealth*, 113 Pa. St. 563; *Mutter* v. Ry. Co., L. R. 38 Chy. Div. 92.

We refrain from extended discussion of the questions involved, because they are fully and ably discussed, and the authorities cited at large, in the briefs of the respective counsel which precede, and to which attention is here directed. [See 62 Ohio State, pp. 191–196.]

We would add, however, that the rights of the plaintiff in this case are based upon a recognition of his standing as an integral part of the corporation. The idea that the corporation is an entity distinct from the corporators who compose it, has been aptly characterized as "a nebulous fiction of thought." Much learning has been indulged in and much space occupied by text-writers and others in an effort to differentiate the essential character of a corporation from that of its stockholders, and great ingenuity has been displayed in the argument, but it has been in the main a fruitless metaphysical discussion. For the purpose of description and in defining corporate rights and obligations, and characterizing corporate action, the fiction that the corporation is an artificial person or entity, apart from its members, may be convenient and possibly useful, but in the opinion of the writer the argument favoring the essential separate entity of the corporation fails, and it is believed that the effort has resulted in misleading conceptions and in much confusion of thought upon the subject. When all has been said it remains that a corporation is not in reality a person or a thing distinct from its constituent parts, and the constituent parts are the stockholders, as much so in essence and in reality as the several partners are the constituent parts of the partnership. Stripped of misleading verbiage, the corporation is a device created by law whereby an aggregation of persons who may avail themselves of its privileges by organization, are permitted to use their property in a way different from that which is permitted to others who do not so organize, and with certain special advantages, among which are a measure as to personal liability for debts, and the power to perpetuate the organization, denied by the law to all others. With

this conception of a corporation, it would seem to follow as matter of course, that the property of a corporation, although subject under some conditions to rights of creditors, is, in the last analysis, that of the stockholders, and that when one seeks an inspection of its books, records, or property, he is in reality but seeking an inspection of his own, and that this should be accorded fully, freely, and at all times when such inspection will not unreasonably inconvenience others who have like interest in and rights to the property, and that the attempt to unreasonably hamper such inspection, by officers, managers, or others, is an unjust exercise of power and one which courts should not sanction.

Nor can the officers of the corporation, or the other stockholders, justly complain. They have chosen this method of investing their means and conducting the business for personal profit, a method which, as we have seen, is especially favored by the law, and they should expect to endure such inconveniences, and such chances of exposure of management, as the method entails. In other words, is is not unreasonable that they should be required to take the bitter with the sweet.

No error is found in the judgments of the courts below, and they will be

Affirmed.

CHAPTER XIV.

STOCKHOLDER'S RIGHT TO BRING SUIT IN REFERENCE TO CORPORATE MANAGEMENT, OR TO PROTECT CORPORATE INTERESTS.

SMITH v. HURD ET ALS.

1847. 12 Metcalf (Mass.), 371.1

This was a special action on the case, by a stockholder of the Phœnix Bank against the directors. There were two counts; one founded in non-feasance of official duty, the other in misfeasance.

The first count alleged (inter alia) that it was the duty of the directors to direct and superintend the proceedings of the officers, and to exercise reasonable vigilance in seeing that the property of the bank was not lost, wasted, or misused; but that the directors disregarding their duty, and contriving together to injure and deceive the plaintiff therein, neglected to give reasonable personal attention to the business of the bank; and negligently permitted the whole business to be managed by the president, Wyman, who loaned its monies on insufficient securities, used certain sums himself, and made loans to individual directors exceeding the limits of the law; whereby the bank capital became wholly lost, and plaintiff was made liable, under the law, for his proportion of the capital lost by the official mismanagement of the directors, and further liable to pay large sums for the redemption of the bills of the bank.

The second count alleged (inter alia) that the directors, disregarding their duties, and contriving together to injure and deceive the plaintiff therein, concurred with each other that the whole business should be managed by the president, Wyman, as he should see fit; and that defendants themselves declared dividends when there were no profits, and caused false returns to be made to the State authorities, by which means plaintiff was misled and induced to rely on the security of his investment. And, generally, the second count charged as acts of the defendants (done through Wyman) the matters which, in the first count, were charged as negligences and permissions, and deduced

¹ Statement abridged. Arguments omitted. - ED.

therefrom in like manner the failure of the bank, and the special damage to the plaintiff. The count concluded with an averment that defendants, by "misconducting the business of said bank, as aforesaid, so wilfully, deceitfully and fraudulently mismanaged the business and property of the said bank, that the whole capital thereof was utterly lost and wasted."

Defendants demurred to the declaration.

B. R. Curtis and B. Rand, for defendants. Gardiner (Greenleaf with him), for plaintiff.

Shaw, C. J. This is certainly a case of first impression. We are not aware that any similar action has been sustained in England, or in any of the courts of this country. It is founded on no statute. an action on the case, at common law, brought by an individual holder of shares in an incorporated bank, against the directors, not including the president, setting forth various acts of negligence and malfeasance, through a series of years, in consequence of which, as the declaration alleges, the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value. The circumstance that no such action has been maintained, would certainly be no decisive objection, if it could be shown to be maintainable on principle. But the fact, that similar grievances have existed to a great extent, and in numberless instances, where such an action would have presented an obvious and effective remedy, affords strong proof, that in the view of all such suffering parties, and their legal advisers and guides, there was no principle on which such an action can be maintained.

If an action can be brought by one stockholder, it may be brought by the holder of a single share; so that for one and the same default of these directors, thirty-five hundred actions might be brought. If it may be sustained by proof of an act, or series of acts, of carelessness, neglect, and breach of duty, in managing the affairs of the bank, by which the whole value of the stock is destroyed, it may, on the same principle, be maintained on any act or instance of such negligence, by which the shares are diminished in value fifty, ten, five, or one per cent. Still, notwithstanding these consequences, if the plaintiff has a good right of action, upon recognized and sound legal principles, his action ought to be sustained.

But the court are of opinion that the action cannot be maintained; and that on several grounds, a few of the more prominent of which may be alluded to.

1. There is no legal privity, relation, or immediate connexion, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers and servants are responsible for all contracts, express

or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it. The very purpose of incorporation is, to create such legal and ideal person in law, distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps it is not too much to say the utter impracticability, of such a number of persons acting together in their individual capacities. The practical difficulty would be nearly as great, whether it were held that all must join in an action to recover damage for an injury to the common property, or that each might sue separately.

The stockholders do, indeed, ordinarily elect the directors; but it is as parts and members of the corporation, in their corporate capacity, in modes pointed out by the charter and by-laws, so that the directors are the appointees of the corporation, not of the individuals. Indeed, I believe there is a provision in the bank charters—there certainly was formerly—which is equally to the present purpose; namely, that the Commonwealth shall be at liberty to add a certain amount to the capital of various banks, and appoint a proportional number of directors. Such directors, so appointed, pursuant to the charter regulating the legal organization of the body, would stand in all respects on the footing of directors chosen by the stockholders. If these were liable to the action of individual stockholders, those would be, in like manner.

- 2. The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined. They are members of an organized body, and exercise such powers as the organization of the institution gives them. Stockholders in banks have a separate right to dividends, when declared, and to a distributive share of the capital stock, if any remains when the charter of the bank is at an end, and its debts paid.
- 3. But another important consideration is, that the injury done to the capital stock by wasting, impairing, and diminishing its value, is not, in the first instance, nor necessarily, a damage to the stockholders. All sums which could, in any form, be recovered on that ground, would be assets of the corporation, and when collected and received by directors, receivers, or any other persons entitled to receive the same, they would be held in trust, first to redeem the bills and pay the debts of the bank; and it would be only after these debts were paid, and in case any surplus should remain, that the stockholders would be entitled to receive any thing. It is, therefore, an indirect, contingent and sub-

ordinate interest, which each stockholder has, in damages so to be recovered against directors. If, upon such indirect, contingent, and remote interest, individual stockholders could recover for the defaults of directors, and especially, as is alleged in this case, where these defaults have been so great as to sink the capital, a fortiori would the creditors of the bank individually have a right to maintain similar actions; because their claim upon the funds, being prior to that of stockholders, would be somewhat more immediate and direct.

In the same connexion, it is obvious to remark, that a judgment in favor of one stockholder would be no bar to an action by a creditor, nor a judgment by both, to an action by the corporation.

4. But it is said, that although the real and personal estate, the securities and capital stock, are, in legal contemplation, vested in the corporation, yet the individual has a separate and distinct property and interest in his particular shares, by any injury to which he may have a separate damage. To some extent, it is true that he has a several interest in his shares; but it is to be taken with some qualifications. Strictly speaking, shares in a bank do not constitute a legal estate and property; it is rather a limited and qualified right which the stockholder has to participate, in a certain proportion, in the benefits of a common fund, vested in a corporation for the common use; it is a qualified and equitable interest, a valuable interest, manifested usually by a certificate, which is transferable. To the extent of this separate and peculiar interest, a stockholder, no doubt, might maintain his separate and special action, according to the nature of the wrong done to him in respect to it; as trover or trespass, for the conversion or tortious taking of his certificate; trespass on the case for refusing to make a transfer on a proper occasion; assumpsit for a dividend declared, and the like. But an injury done to the stock and capital, by negligence, or misfeasance, is not an injury to such separate interest, but to the whole body of stockholders in common. It is like the case of a common nuisance, where one who suffers a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action. Otherwise, he cannot. Co. Lit. 56 a. 3 Steph. N. P. 2372. Lansing v. Smith, 8 Cow. 146.

But we are pressed with the argument, that for every damage which one sustains, which is caused by the wrongful act of another, he ought to have a remedy. This is far from being universally true. Another maxim in regard to claims for damage is, causa proxima, non remota, spectatur. Thousands of instances occur, in which one sustains consequential and incidental damage from the misconduct of another, without a remedy at law. By the misconduct of the officers or agents of a parish, town, county, or even of the State or the Union, defalcations may take place, treasure be squandered and wasted, and all the members of the respective aggregate bodies suffer damage, for which the law, from the nature of the case, can afford no direct remedy. But the

true answer to the objection is, that stockholders have a remedy, a theoretic one indeed, and perhaps often inadequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common property, by the recovery of damages; and each individual stockholder has his remedy, through the powers thus vested in the corporation, for the common benefit.

On the whole, the court are of opinion that the demurrer is well taken, and that the action cannot be maintained.

DODGE v. WOOLSEY.

1855. 18 Howard (U. S.), 331.1

APPEAL from the U.S. Circuit Court for the District of Ohio.

This is a suit in equity by John M. Woolsey, to enjoin the collection of a tax, assessed by the State of Ohio, on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio. The defendants are Dodge, the tax collector, the directors of the bank, and the bank itself.

Woolsey avers that he is a citizen of Connecticut, that he is the owner of thirty shares in the Branch Bank of Cleveland, that Dodge and the other defendants are all citizens of Ohio, and that the Commercial Branch Bank is a corporation, made such by an act of the legislature of Ohio. He alleges that, by the act of incorporation, the Bank was to pay semiannually to the State a certain percentage on its profits, which was to be in lieu of all taxes to which the corporation, or the stockholders on account of their stock, would otherwise be subject. He further alleges that subsequent changes were made by the constitution and statutes of Ohio, undertaking to tax the Bank at a different and more burdensome rate. He asks the Court to enjoin Dodge from collecting by distress a tax which has been assessed against the Bank under this law; contending that the subsequent statute and assessment are in violation of the clause in the U.S. Constitution, which prohibits States from passing laws impairing the obligation of contracts. He finally declares that, as a stockholder of the Bank, he had requested the directors to take measures, by suit or otherwise, to assert the franchises of the Bank against the collection of what he believes to be an unconstitutional tax, and that they had refused to do so.

Dodge filed an answer, in which he denied that Woolsey had made any application to the directors to prevent the collection of the tax. But it was agreed by the counsel that such an application had been

¹ Statement abridged. Only so much of the case is given as relates to one point, -ED.

made; and that the directors replied that, though concurring in the view that the tax was illegal, yet, in consideration of the many obstacles in the way of testing the law in the Courts of the State, they could not consent to take the action which they were asked to take.

Spalding and Pugh, for appellant. Stanberry and Vinton, for appellee. WAYNE, J. [After stating the case].

Upon the foregoing pleadings and admission, the circuit court rendered a final decree for the complainant, perpetually enjoining the treasurer against the collection of the tax, under the act of the 13th February, 1852, and subjecting the defendant, Dodge, to the payment of the costs of the suit. From that decision the defendant, Dodge, has appealed to this court.

His counsel have relied upon the following points to sustain the appeal:

- 1. The complainant does not show himself to be entitled to relief in a court of chancery, because the charter of the bank provides that its affairs shall be managed by a board of directors, and that they are not amenable to the stockholders for an error of judgment merely. And that in order to make them so, it should have been averred that they were in collusion with the tax collector in their refusal to take legal steps to test the validity of the tax.
- 2. It was urged that this suit had been improperly brought in the circuit court of the United States for the district of Ohio, because it is a contrivance to create a jurisdiction, where none fairly exists, by substituting an individual stockholder in place of the Commercial Bank as complainant, and making the directors defendants; the stockholder being made complainant, because he is a citizen of the State of Connecticut, and the directors being made defendants to give countenance to his suit.
- 3. It was said, if the foregoing points were not available to defeat the action, that it might be contended that the defendant was in the discharge of his official duty when interrupted by the mandate of the circuit court, and that the tax had been properly assessed by the law of the State, in conformity with its constitution, of the 1st September, 1851.

We will consider the points in their order. The first comprehends two propositions, namely: that courts of equity have no jurisdiction over corporations, as such, at the suit of a stockholder for violations of charters, and none for the errors of judgment of those who manage their business ordinarily.

There has been a conflict of judicial authority in both. Still, it has been found necessary, for prevention of injuries for which common-law courts were inadequate, to entertain in equity such a jurisdiction in the progressive development of the powers and effects of private corporations upon all the business and interests of society.

It is now no longer doubted, either in England or the United States,

that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at 2 Russ. & Mylne Ch. R., Cunliffe v. Manchester and Bolton Canal Company, 480, n.; Ware v. Grand Junction Water Company, 2 Russ. & Mylne, 470; Bagshaw v. Eastern Counties Railway Company, 7 Hare Ch. R. 114; Angell & Ames, 4th ed. 424, and the other cases there cited.

It was ruled in the case of Cunliffe v. The Manchester and Bolton Canal Company, 2 Russ. & Mylne Ch. R. 481, that where the legal remedy against a corporation is inadequate, a court of equity will interfere, and that there were cases in which a bill in equity will lie against a corporation by one of its members. "It is a breach of trust towards a shareholder in a joint stock incorporated company, established for certain definite purposes prescribed by its charter, if the funds or credit of the company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of a majority; and, therefore, he may file a bill in equity against the company in his own behalf to restrain the company by injunction from any such diversion or misapplication." In the case of Ware v. Grand Junction Water Company, 2 Russell & Mylne, a bill filed by a member of the company against it, Lord Brougham said: "It is said this is an attempt on the part of the company to do acts which they are not empowered to do by the acts of parliament," meaning the charter of the company; "so far I restrain them by injunction." "Indeed, an investment in the stock of a corporation must, by every one, be considered a wild speculation, if it exposed the owners of the stock to all sorts of risk in support of plausible projects not set forth and authorized by the act of incorporation, and which may possibly lead to extraordinary losses." The same jurisdiction was invoked and applied in the case of Bagshaw v. The Eastern Counties Railway Company; so, also, in Coleman v. The same company, 10 Beavan's Ch. Reports, 1. It appeared in that case that the directors of the company, for the purpose of increasing their traffic, proposed to guarantee certain profits, and to secure the capital of an intended steam packet company, which was to act in connection with the railway. It was held, such a transaction was not within the scope of their powers, and they were restrained by injunction. And in the second place, that in such a case one of the shareholders in the railway company was entitled to sue in behalf of himself and all the other shareholders, except the directors, who were defendants, although some of the shareholders had taken shares in the steam packet company. It was contended in this case that the corporation might pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability was to increase the traffic upon the railway, and thereby increase the traffic to the shareholders. But the master of the rolls, Lord Langdale, said, "there was no authority for anything of that kind."

But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied. It is an improper application for a railway company to invest the profits of the company in the purchase of shares in another company.

The result of the cases is well stated in Angell & Ames, paragraphs 391, 393. "In cases where the legal remedy against a corporation is inadequate, a court of equity will interfere, is well settled, and there are cases in which a bill in equity will lie against a corporation by one of its members." "Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern; yet beyond the limits of the act of incorporation, the will of the majority cannot make, an act valid; and the powers of a court of equity may be put in motion i at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be/ observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors."...

We have then the rule and its limitation. It is contended that this case is within the limitation; or that the directors of the Commercial Bank of Cleveland, in their action in respect to the tax assessed upon it, under the act of April 18, 1852, and in their refusal to take proper measures for testing its validity, have committed an "error of judgment merely."

Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true,

of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it, is not "an error of judgment merely," and cannot be so called in any case. It amounted to an illegal application of the profits due to the stockholders of the bank, into which a court of equity will inquire to prevent its being made.

Thinking, as we do, that the action of the board of directors was not "an error of judgment merely," but a breach of duty, it is our opinion that they were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. This conclusion makes it unnecessary for us to notice further the point made by the counsel that the suit should have been brought in the name of the corporation, in support of which they cited the case of the Bank of the United States v. Osborn. The obvious difference between this case and that is, that the Bank of the United States brought a bill in the circuit court of the United States for the district of Ohio, to resist a tax assessed under an act of that State, and executed by its auditor, and here the directors of the Commercial Bank of Cleveland, by refusing to do what they had declared it to be their duty to do, have forced one of its corporators, in selfdefense, to sue. If the directors had done so in a State court of Ohio, and put their case upon the unconstitutionality of the tax act, because it impaired the obligation of a contract, and had the decision been against such claim, the judgment of the State court could have been re-examined, in that particular, in the supreme court of the United States, under the same authority or jurisdiction by which it reversed the judgment of the supreme court of Ohio, in the case of the Piqua Branch of the State Bank of Ohio v. Jacob Knoop, treasurer of Miami county, 16 How. 369.

Decree of Circuit Court affirmed. Catron, J., Daniel, J., and Campbell, J., dissented.

PEABODY ET AL. v. FLINT ET ALS.

1863. 6 Allen (Mass.), 52.1

BILL IN EQUITY, brought March 9, 1860, by two stockholders of the Lowell and Salem Railroad Company, for themselves and in behalf of the other stockholders, against certain directors and agents of said company, and of the Lowell and Lawrence Railroad Company, whose

¹ Arguments omitted. - ED.

railroad connected with that of the former company, and others, charging various acts of conspiracy and fraud, by which the interests of the stockholders in the Salem and Lowell Railroad Company were prejudiced and sacrificed, for the benefit of the Lowell and Lawrence Railroad Company; and especially in reference to false and fraudulent representations and practices for the purpose of injuring the credit of the Salem and Lowell Railroad, and enabling them to issue and take its bonds, on the 20th of August 1856, secured by a mortgage of property of the company, at prices below their true value; and also in reference to a contract executed on the 1st of October 1858, by which the Lowell and Lawrence Railroad Company were to "do and perform all the transportation of persons and freight upon and over the Salem and Lowell Railroad," and to pretended settlements made between said companies. The bill also set forth that, since the plaintiffs had reason to suspect the frauds and conspiracies charged, they have demanded explanations of the defendants, petitioned the general court for an investigation, and endeavored to procure the election of directors who would cause the matters to be investigated, but, being in a minority, have failed to succeed. The defendants filed a general demurrer. The plaintiffs, at the argument, moved to amend their bill by joining the Salem and Lowell Railroad Company as defendants.

This case was argued in January 1862.

J. G. Abbott and T. Wentworth, for defendants.

S. H. Phillips and J. A. Gillis (W. P. Webster with them,) for plaintiffs.

Chapman, J. The bill sets forth a very complicated case. A full consideration of the charges of fraud which it contains would involve the necessity of examining the various legislative acts which it recites, and the contracts and dealings which it sets forth. But such a discussion is unnecessary.

The principal ground of demurrer relied on by the defendants is, that the plaintiffs have not, and never had, any remedy for such injuries as they complain of; that, conceding the truth of the allegations that the directors of the Salem and Lowell Railroad Company, either by themselves or with the consent and connivance of a majority of their stockholders, combined, either among themselves, or with the Lowell and Lawrence Railroad Company or its directors, or with any of the other defendants, to defraud a minority of the stockholders of the Salem and Lowell Railroad Company, and in pursuance of this combination did the acts alleged, and so dealt and managed as to destroy the value of the stock as set forth, yet the only relief which the minority can have is the very imperfect one of selling out their stock for what it will bring in market. This doctrine is said to result from the nature of corporate property, which, being owned absolutely by the corporation, is under the absolute control of a majority of the stockholders, and of such directors as they choose to elect. Their decisions and acts, it is said. are final, and the minority are bound to submit to them.

But this doctrine, if correct, would place the property of stockholders in a corporation in a perilous condition. For it would enable the managers of one corporation to get the control of another by the purchase of a majority of its stock for the purpose, and then to manage its affairs in such subservience to the interests of their own corporation. as to render the stock of the minority worthless, and avail themselves of its value without compensation. The demurrer concedes, for the purposes of this discussion, that the managers of the Lowell and Lawrence Railroad Company have thus acted in respect to the minority of stockholders in the Salem and Lowell Railroad Company. It requires no great sagacity to see how similar frauds may be practised in behalf of many other railroads against connecting or rival roads, so that a system of railroad connections may become a system of frauds. may be practised with impunity between railroad corporations, it may also be practised between manufacturing corporations, and a managing majority may, at their pleasure, sacrifice the interests of the minority for the benefit of another corporation owned by them. The same remark is true in respect to several other classes of business corporations. The question thus presented is of great importance, because there is no known practicable method of establishing and managing railroads except by means of corporations; and many other great enterprises and branches of business which require, for their successful prosecution, a large and permanent investment of capital, are also usually and most conveniently established and managed by means of corporate organizations.

This doctrine is also said to result from the nature of corporations and corporate property, as stated in Smith v. Hurd, 12 Met. 371. The views taken in that case are unquestionably correct; and they apply with especial force to that class of corporations whose stockholders have little more power than to elect officers, who, when elected, are invested by law with the sole and exclusive power of managing the concerns and business of the corporation. The corporation itself is regarded as a distinct person; and its property is legally vested in itself, and not in its stockholders. As individuals, they cannot, even by joining together unanimously, convey a title to it, or maintain an action at law for its possession, or for damages done to it. Nor can they make a contract that shall bind it, or enforce by action a contract that has been made with it. The artificial person called the corporation must manage its affairs in its own name, as exclusively as a natural person manages his property and business. The officers, though chosen by vote of the stockholders, are not their agents, but the agents of the corporation; and they are accountable to it alone. Therefore one or more of the stockholders cannot maintain an action at law against the officers for any breach of official duty that injures the corporate property as a whole. An injury done by the directors of a company to an individual by inducing him to become a member of the company by means of false representations is actionable, because it is an injury

to him and not to the company. Gerhard v. Bates, 2 El. & Bl. 476. But the interest of stockholders is, as stated in Smith v. Hurd, cited above, merely a qualified and equitable interest.

But if there is an equitable interest, there must result from it equitable relations and equitable rights; and these rights may be enforced by equitable remedies. As between the corporation itself and its officers, it was long since held that they were trustees, and that a court of equity would hold them responsible for every breach of trust. Charitable Corporation v. Sutton, 2 Atk. 400. The corporation itself holds its property as trustee for the stockholders, who have a joint interest in all its property and effects, and each of whom is related to it as . . cestui que trust. The corporation may call its officers to account if they wilfully abuse their trust, or misapply the funds of the company; and if it refuses to sue, or is still under the control of those who must be made defendants in the suit, the stockholders who are the real parties in interest may file a bill in their own names, making the corporation a party defendant; or a part of them may file a bill in behalf of themselves and all others standing in the same relation, if convenience requires it. Robinson v. Smith, 3 Paige, 222, and cases there cited. See also the other authorities cited for the plaintiffs on this point; and Hersey v. Veazie, 24 Maine, 9, and Smith v. Poor, 40 Maine, 415, cited by the defendants.

If other parties have participated with the officers in such proceedings, they may, according to the established principles of equity pleading, be joined as parties. In the discovery of frauds, and in furnishing remedies to parties defrauded, equity does not suffer technicalities to stand in its way, but seizes upon the substance of the case, and holds all parties to their just responsibility, following trust property into the hands of remote grantees and purchasers who have taken it with notice of a trust, in order to subject it to the trust. The objection, therefore, that a court of equity has no power to furnish a remedy in a case of this character, is untenable.

But there is another objection to the bill which must prevail. Equity regards diligence as one of its important elements; and it discountenances laches as inequitable; and unreasonable delay to prosecute an existing claim is a bar to a bill in equity, especially when the parties cannot be restored to their original position, and injustice may be done. Veazie v. Williams, 3 Story R. 610. Tash v. Adams, 10 Cush. 252. Fuller v. Melrose, 1 Allen, 166. Story on Eq. § 1520 and note 3.

In this case there has been unreasonable delay. The bill was sworn to March 9, 1860. The mortgage complained of was executed August 20, 1856, and the lease to the Boston and Lowell Railroad Company, October 1, 1858. The contracts and dealings to be investigated and readjusted commenced in 1850, and continued till the execution of the mortgage, and even to the execution of the lease in 1858. Every day's delay increased the complication and the difficulty of making an

equitable adjustment of them. In the mean time, the stock in the corporations must have been frequently changing hands, and there are no means of adjusting the equities growing out of such changes. A similar remark is applicable to the holders of the bonds secured by the mortgage. The nature of the case required the utmost diligence, in order to prevent injustice. Yet the plaintiffs delayed more than three years and a half after the making of the mortgage, and until after they had sought aid from the legislature. It does not appear that they had not at that time sufficient knowledge of the facts to enable them to prosecute, or that they have since gained any important information; and a decree such as they now seek may injuriously affect many persons who have become stockholders or bondholders during the period of this delay. For this reason the demurrer is sustained, and the bill dismissed.

MARSHALL, J., IN LAND, &c., CO. v. McINTYRE.

1898. 100 Wisconsin, 245, pp. 256, 257.

MARSHALL, J.... "The general rule is that where a cause of action exists in favor of a corporation, and its governing body refuses to enforce it, any member thereof may do so by suing in equity in behalf of himself and all others similarly situated. . . . The purpose of the remedy in such cases is not to interfere with the exercise of legal discretion on the part of those charged with the primary duty of enforcing corporate rights, but to furnish relief where there is an unjustifiable neglect or refusal to exercise such discretion. Neither is the remedy confined to the one which the corporation may invoke, whether equitable or legal. The remedy afforded to a member of a corporation is necessarily in equity, for he has no direct interest to be protected

1 "Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be granted, is founded upon mere delay, that delay of course not amounting to bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." LORD SELBORNE, in Lindsay Petroleum Co. v. Heard, L. R. 5 Privy Council Cases, 221, pp. 239, 240; and see errata in same volume.

Stockholders "must apply so recently after the doing of the act of which they complain that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person. . . ." If the stockholder "wants protection against the consequences of an ultra vires act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others." VAN FLEET, V. C., in Rabe v. Dunlap,

51 New Jersey Equity, 40, pp. 46, 48. - ED.

by a personal action. He must proceed in equity or not at all, join-) ing the corporation as a party in the capacity of trustee for all its members.

"So the test is not whether the corporation can sue in equity, but whether it can sue at all. Whether its remedy, if exercised direct, would be at law or in equity, that of the member indirectly interested to enforce its rights, must always be in equity. That is his only remedy. The direct injury to be remedied is to the corporation as a whole. The cause of action belongs to the corporation, but is enforceable, rather than that justice shall utterly fail, by the remedy in equity at the suit of its members. . . .

"So the rule is firmly established, that where a cause of action exists in favor of a corporation, whatever be its proper remedy, if its governing body refuses to proceed, justice cannot thereby be defeated, for those upon whom the injury indirectly falls may obtain redress in equity."...

FOSS v. HARBOTTLE.

1843. 2 Hare, 461.1

BILL in equity by Foss and Turton, shareholders in a corporation styled the Victoria Park Company, on behalf of themselves and all other shareholders, against five persons who had been directors, and also against several other persons.

The case stated in the bill was, in part, as follows:

At or after the formation of the company was agreed upon, an arrangement was fraudulently concerted between certain parties (including a majority of the directors), with the object of enabling themselves to derive a profit or personal benefit from the establishment of the company. The arrangement was, that certain of the parties should be appointed directors, and should purchase for the company certain lands owned by themselves and by other parties to the combination, at greatly increased and exorbitant prices. The directors, accordingly, before the passing of the act, agreed to purchase certain lands at rents or prices greatly exceeding those at which the vendors had purchased the same. After the passing of the act of incorporation, the directors and their confederates proceeded to carry into execution the previously formed design of fraudulently profiting by the establishment of the company and at its expense. The directors, accordingly, on behalf of the company, purchased from themselves, and from the other parties, lands charged with chief or fee-farm rents, greatly exceeding the rents payable to the persons from whom the said vendors had purchased the same. these means, the company took the land, charged not only with the chief

¹ Statement abridged. Arguments and part of opinion omitted. - Ed.

rents reserved to the original landowners, but also with additional rents reserved and payable to the immediate vendors (the directors et als.). In further pursuance of the same fraudulent design, the directors, after purchasing the said land for the company, applied about 27,000 l. of the monies in their hands, belonging to the company, in the purchase or redemption of the rents so reserved to themselves and their associates, leaving the land subject only to the chief rent reserved to the original landowners. The lands purchased by defendants were re-sold by them to the company at a profit and at a price considerably exceeding the real value of the same. Owing to the sums appropriated by the directors to themselves, and paid to others in reduction of the increased chief rents, and payment of such rents, and owing to their having otherwise misapplied monies, the funds of the company in their hands were exhausted, and they raised large sums upon mortgage or incumbrance of lands and property of the company, which they had no authority to do under the act of incorporation. Some of the lands thus mortgaged, though the equitable property of the company, did not stand in the name of the company; and hence some of the mortgagees had no notice of want of authority on the part of the mortgagors.

The bill further alleged, that there had ceased to be a sufficient number of directors to constitute a board for transacting the business of the company; and that, in the present circumstances of the company and of the board of directors, the shareholders had no power to take the property of the company out of the hands of the former directors, or to appoint directors to supply the vacancies, or to wind up, or dissolve, the company, without the assistance of the court.

The bill also alleged, that the defendants concealed from the plaintiffs and the other shareholders the aforesaid fraudulent and improper acts and proceedings; and that plaintiffs and the other shareholders had only recently ascertained the particulars thereof, so far as they were now stated.

The bill prayed, that an account might be taken of the losses and expenses incurred in consequence of the said fraudulent and improper dealings of the defendants with the monies, lands, and property of the company, which they were liable to make good, and that they might be respectively decreed to make good the same, including in particular the profits made by buying and re-selling the said land; that it might be declared that the mortgages upon the lands, etc., created as aforesaid, so far as regards the defendants who executed the same or were privy thereto, were created fraudulently and in violation of the provisions of the act, and that certain of the defendants might be decreed to make good to the company the principal and interest due upon such of the mortgages as were still subsisting; that inquiries might be directed to ascertain which of the mortgages could be avoided and set aside as against the persons claiming the benefit thereof, and that proceedings might be taken for avoiding them accordingly; and that a receiver might be appointed.

Certain of the defendants demurred to the bill, assigning for cause, want of equity, want of parties, and multifariousness.

Loundes, Rolt, Walker, and Glasse, in support of the demurrers. James Russell, Roupell, and Bartrum, for the bill.

WIGRAM, VICE-CHANCELLOR. The relief which the bill in this case seeks, as against the Defendants who have demurred, is founded on several alleged grounds of complaint; of these it is only necessary that I should mention two, for the consideration of those two grounds involves the principle upon which I think all the demurrers must be One ground is, that the directors of the Victoria Park Company, the Defendants Harbottle, Adshead, Byrom, and Bealey, have, in their character of directors, purchased their own lands of themselves for the use of the company, and have paid for them, or, rather, taken to themselves out of the monies of the company a price exceeding the value of such lands: the other ground is, that the Defendants have raised money in a manner not authorized by their powers under their act of incorporation; and, especially, that they have mortgaged or incumbered the lands and property of the company, and applied the monies thereby raised in effect, though circuitously, to pay the price of the land which they had so bought of themselves.

[Part of opinion omitted.]

For the present purpose, I shall assume that a case is stated, entitling the company, as matters now stand, to complain of the transactions mentioned in the bill.

The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of the Attorney-General v. Wilson 1 (without going further), it may be stated as undoubted law, that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in the Attorney-General v. Wilson in this, — that instead of the corporation being formally represented as plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of, - the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

It was not, nor could it successfully be argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be, whether

the facts alleged in this case justify a departure from the rule which prima facie would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.

The demurrers are, — first, of three of the directors of the company, who are also alleged to have sold lands to the corporation under the circumstances charged; secondly, of Bealey, also a director, alleged to have made himself amenable to the jurisdiction of the Court to remedy the alleged injuries, though he was not a seller of land; thirdly, of Denison, a seller of land, in like manner alleged to be implicated in the frauds charged, though he was not a director; fourthly, of Mr. Bunting, the solicitor, and Mr. Lane, the architect of the company. These gentlemen are neither directors nor sellers of land, but all the frauds are alleged to have been committed with their privity, and they also are in this manner sought to be implicated in them. The most convenient course will be, to consider the demurrer of the three against whom the strongest case is stated; and the consideration of that case will apply to the whole.

The first objection taken in the argument for the Defendants was, that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the Defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, inter se, because, in order to make their common objects more attainable, the crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in Wallworth v. Holt, and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

But, on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from, — rules, which, though in a sense technical, are founded on general principles of justice and convenience; and the question is, whether a case is stated in this bill, entitling the Plaintiffs to sue in their

¹ 4 Myl. & Cr. 635. See also 17 Ves. 320, per Lord Eldon.

private characters. [His Honor stated the substance of the act, sections 1, 38, 39, 43, 46, 47, 48, 49, 67, 70, 114, and 129.] The result of these clauses is, that the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings; and, as I understand the act, the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated. There may possibly be some exceptions to this proposition, but such is the general effect of the provisions of the statute.

Now, that my opinion upon this case may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might primâ facie entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation. The second ground of complaint may stand in a different position; I allude to the mortgaging in a manner not authorized by the powers of the act. This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it. This distinction is found in the case of *Preston v. The Grand Collier Dock Company*.²

On the first point, it is only necessary to refer to the clauses of the act to shew, that, whilst the supreme governing body, the proprietors at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the Plaintiffs on the present record. This in effect purports to be a suit by cestui que trusts, complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. The complaint is, that those trustees have sold lands to themselves, ostensibly for the benefit of the cestui que trusts. The proposition I have advanced is, that although the act should prove to be voidable, the cestui que trusts may elect to confirm it. Now, who are the cestui que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trust; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the

¹ Supra, p. 464, п., et seq. ² 11 Sim. 327, S. С.; 2 Railway Cases, 835.

powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present Plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shewn either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion: this latter point is nowhere suggested in the bill: there is no suggestion that an attempt has been made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if those transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights.

[The learned judge then controverted the plaintiff's position that, upon the allegations of the bill, it must be regarded as impossible to now legally convene a general meeting of the shareholders. He was of opinion that certain clauses in the act were merely directory, and that a general meeting could be called even if the corporation lacked certain officers. He also held, "that the existence of a board of directors defacto is sufficiently apparent upon the statements in the bill." In this discussion he said — "I have applied strictly the rule of making every intendment against the pleader in this case, . . . : "also — ". . . I have felt bound in favor of the defendants to construe this bill with strictness."]

The second point which relates to the charges and incumbrances alleged to have been illegally made on the property of the company is open to the reasoning which I have applied to the first point, upon the question whether, in the present case, individual members are at liberty to complain in the form adopted by this bill; for why should this anomalous form of suit be resorted to, if the powers of the corporation may be called into exercise? But this part of the case is of greater difficulty upon the merits. I follow, with entire assent, the opinion expressed by the Vice Chancellor in Preston v. The Grand Collier Dock Company, that, if a transaction be void, and not merely voidable, the corporation cannot confirm it, so as to bind a dissenting minority of its members. But that will not dispose of this question. The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the act. The mortgagees are not

defendants to the bill, nor does the bill seek to avoid the security itself. if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings being taken aliunde to set aside these transactions against the mortgagees. The object of this bill against the defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill shewed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different considerations arise in a case like the present, in which the consequences only of the alleged illegal acts are sought to be visited personally upon the directors. The money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of Upon this, one question appears to me to be, whether the company could confirm the former transactions, take the benefit of the money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to the company to do this; and my opinion already expressed on the first point is, that the transactions which constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question, — the question of confirmation or avoidance, - cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in the same predicament as that which relates to the other subjects of complaint. Both questions stand on the same ground, and, for the reasons which I stated in considering the former point these demurrers must be allowed.

WELLS, J., IN BREWER v. BOSTON THEATRE et al.

1870. 104 Massachusetts, 378, pp. 394-397.1

Wells, J. . . . The defendants contend that the corporation cannot be deprived of its right to determine, in all matters not ultra vires, whether to impeach or to ratify transactions supposed to be prejudicial to its interests. Granting this position, it would result that in no case, as to matters intra vires, could a suit be maintained by individual stockholders to enforce rights or redress wrongs of the corporate body, except where the delay necessary in order to secure corporate action might defeat or endanger the attainment of appropriate relief. If, when called upon to act, the corporate body should elect to confirm the supposed wrongful transactions, or should do so indirectly by refusal to act, they would no longer be open to impeachment. If, on the other hand, it should determine to take action, it would do so in its own name and behalf; and there would be no ground of necessity for proceedings in the name of the individual corporator.

We are not prepared to say that this would not be the case in all matters to which the only objection is that they are prejudicial, or supposed to be so, to the corporate interests merely, but not illegal in themselves, and affecting all the corporators alike. Perhaps it would be so whenever the surrender of property or the release of rights, acquired by the corporation through the transactions sought to be impeached, is necessary in order to reach the proper remedy. Great Luxembourg Railway Co. v. Magnay, 25 Beav. 586. The corporation might be entitled to determine for itself exclusively whether it would retain or release property or rights thus acquired, although it thereby precluded, or rendered ineffectual, all proceedings against parties who may have made illegal or fraudulent gains out of the transactions. These questions, however, we need not at present decide.

The cases now before us involve no release of property or rights by the corporation. The alleged wrongs are not merely prejudicial to the interests of the corporation; but are such as tend to deprive one part of the corporators of their rightful share in the fruits of the common property and business, for the advantage of others of the corporators. This inequality and injustice is accomplished by means of the control over the corporate organization and management, which has been secured by the parties so benefited. By the amendments to the several bills it is alleged that such control has been exercised since the year

² This was a bill in equity, brought by minority stockholders, against the corporation and against certain directors and other individuals, for fraudulently conspiring to lease the corporate property on a rent much below the market value and share in the profits of the lessees. The bill (as amended) alleged that individual defendants own or control a majority of the stock and control the proceedings at stockholders' meetings; also that a majority of the directors are fraudulently colluding with these defendants to continue to them the control of the corporation and its property. A demurrer was overruled. — Ed.

1866, inclusive, by Tompkins and Thayer, with the aid of the other \ defendants. That which is important is the fact of such control and its exercise for such purpose, rather than the means by which it has been obtained. A majority of the corporators have no right to exercise the control over the corporate management, which legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves or to any of the shareholders, to the exclusion or prejudice of the others. And if any have obtained such unfair advantage by fraud or abuse of the trust confided to them as officers or agents of the corporation, it is not in the power of a majority to ratify or condone the fraud and breach of trust, so far as it affects the rights of the others, without reasonable restitu-This proposition, if stated in reference to formal transactions, such as assessments of capital or dividends of income, would not be questioned. Preston v. Grand Collier Dock Co., 11 Sim. 327. Hodgkinson v. National Live Stock Insurance Co., 26 Beav. 473. But the indirect appropriation of the common property, profits or means of profit, to their own benefit, by any portion of the corporators, in fraud of their associates, is equally incapable of being authorized or ratified by the vote of a majority of the corporators, or by any act or omission of the corporate body. Gregory v. Patchett, 33 Beav. 595. Atwool v. Merryweather, Law Rep. 5 Eq. 464, note. If it were otherwise, the minority would be without means of protection or redress against. inequality and injustice. They would be equally so if they could obtain redress only in the name and through the action of the corporation itself. Such acts are wrongs done primarily to the corporation; and therefore the restitution or redress is to be secured to the corporation. But in their effect and essential character they are wrongs to the individual shareholder, inflicted upon his corporate interests by means of the control over those interests secured through the corporate organization and management. He can seek his redress only through the corporation; but that does not give the corporation the right to deprive him of all redress. Any attempt to do so, whether regarded as the action of the corporation or of a majority of shareholders, would have the same voidable character as the original wrong. Officers of a corporation, dealing with it in matters of their own individual interest, stand very differently in this respect from strangers, who have no occasion to regard any other than the corporate body. If by means of their relations to the corporate management they secure to themselves undue advantage over their associates, they cannot retain it. Such transactions are voidable, not merely for want of authority in the officers by whom they are done, but because neither the officers nor the corporation itself, by whatever majority of votes / it may act, can do, assent to, or confirm them. The wrong to the individual shareholder is the same, whether committed with the concurrence or subsequent approval and adoption of his associates controlling the corporation, or without it.

In our opinion, the facts of these cases, as set forth in the several amended bills, show such abuse of authority and breaches of trust by the defendants, in misappropriating the income of the corporate property to the benefit of themselves or of some of them, as cannot be ratified or remitted by the corporation; and also such incapacity of the plaintiffs to move the corporation to take action for their redress, as entitles them, from necessity, to seek it in the form of these proceedings.

In the first and second of the bills a majority of the present directors are not joined as parties; but the necessity for the mode of proceeding adopted is shown by the allegations that Tompkins and Thayer own or control a majority of the stock and control all meetings of the corporation, and that a majority of the present directors are knowingly, wilfully, and fraudulently endeavoring to continue and secure such control to them.

In support of these conclusions we may cite Atwool v. Merryweather, Law Rep. 5 Eq. 464, note; Hichens v. Cosgreve, 4 Russ. 562; Gregory v. Patchett, 33 Beav. 595; Hodges v. New England Screw Co., 1 R. I. 312; Allen v. Curtis, 26 Conn. 456; Hersey v. Veazie, 24 Maine, 9; March v. Eastern Railroad Co., 40 N. H. 548, 567; Robinson v. Smith, 3 Paige, 222, 233; Peabody v. Flint, 6 Allen, 52.

We do not think the authorities cited in support of the demurrers are in conflict with these positions. The leading case relied on, Foss v. Harbottle, 2 Hare, 461, was a bill to set aside a sale of property to the corporation. It was dismissed because it did not exclude the supposition that the proprietors might lawfully confirm the transaction; nor show that all means had been resorted to and found ineffectual to set the corporate body in motion or that such efforts would have been useless. It involved, of course, a surrender of the property by the corporation.

ATWOOL v. MERRYWEATHER.

1867. L. R. 5 Eq. Cases, 464, note.

This was a bill by the Plaintiff, on behalf of himself and all other the shareholders in the East Pant Du United Lead Mining Company, Limited, except the persons who were Defendants thereto, against Samuel Merryweather, Henry Whitworth, and the East Pant Du Company, Limited, for the purpose of setting aside a contract for the sale and purchase of certain mines (for the purpose of purchasing and working which the company was formed), and compelling repayment

from Merryweather and Whitworth of the sum of £3940, or such portions as had been received by them, and a return of the 600 shares allotted to Merryweather.

The bill stated the incorporation, in 1863, of the company under the promotion of Defendants *Merryweather* and *Whitworth*, who published a prospectus stating that the company was formed "for the purpose of purchasing and working the extensive and valuable mining sets known as the *East Pant Du* and *Colomendy Lead Mines*," and containing very favourable representations of the value of the mines, for the purchase of which the company was stated to have arranged for £7000 — £4000 to be paid in cash, and £3000 in shares of the company.

The capital was fixed at £30,000, divided into 6000 shares of £5 each; but only 2000 shares had been taken altogether, on which £3940 had been received. This money was paid to Merryweather, and 600 shares were registered in his name as paid up, in part payment of the £7000, the alleged price of the mines.

Upon inquiries, the following circumstances were discovered in reference to the formation of the company: Merryweather applied to Whitworth to assist him in disposing of the mines in question, which he held under an agreement for a lease for twenty-one years, and had then discovered to be of no value. Merryweather proposed to dispose of his interest for £4000, and the scheme concocted between himself and Whitworth was, that a company should be formed for the purpose of purchasing and working the mines, which were to be sold to such company for £7000.

Of this money Merryweather was to get £4000, while the remaining £3000 was to be paid to Whitworth for his assistance in getting up the company. This agreement was concealed from the other directors, who were induced to believe that £7000 was bonâ fide to be paid as the purchase-money.

A committee appointed at a meeting of the 1st of June, 1864, recommended by their report that the undertaking should be abandoned, steps taken to relieve the company from any liability on the contract, and to recover back the money already paid by the shareholders.

At an extraordinary general meeting held on the 16th of June, 1864, a resolution was passed for receiving the report by a majority of the shareholders, and on the 30th of June, 1864, a bill was filed in the name of the company, alleging that the contract for the purchase of the mine had been fraudulently obtained by the Defendant Merryweather, and was void, and that he was not entitled to the 600 shares allotted to him in respect of it, and praying that the purchase of the mine might be set aside, and the money paid returned to the shareholders who had advanced it.

On the 6th of July Merryweather and Whitworth caused notices to be issued for a meeting of the board of directors "to consider the course to be taken in reference to the Chancery proceedings which have been instituted in the name of the company." At the meeting

held on the 9th of July Merryweather, Whitworth and Ashworth (the three out of the six directors present at the meeting) passed a resolution that proceedings should be taken to get the bill taken off the file.

On the 1st of August, 1864, the Court was moved to take the bill off the file, but the motion was ordered to stand over until the next term in order to give an opportunity to call a general meeting of the shareholders of the company to take the matter into consideration. A meeting was accordingly held on the 12th of October, "for the purpose of taking the said bill into consideration, and adopting such resolutions in reference thereto as the meeting may determine upon."

A resolution was proposed for adopting and continuing the Chancery proceedings, whereupon an amendment was proposed by Whitworth for referring all matters in difference between the shareholders and Merryweather to arbitration, and for staying all legal proceedings. This amendment was lost by 11 votes to 4 upon a show of hands, and the original resolution was carried by 10 to 4. A poll having been demanded upon the amendment, proxies were produced, and 14 persons, holding altogether 1070 shares and 324 votes, voted against the amendment, and 12 persons, holding 1490 shares and having 344 votes, voted for the amendment. But excluding the votes of the Defendants Merryweather and Whitworth, there was a majority of 86 votes against the amendment, and excluding only the votes of Merryweather there was a majority against it of 58 votes. The motion to take the bill off the file was renewed, and on the 5th of December, 1864, the Vice-Chancellor Sir W. P. Wood directed the bill to be taken off the file, but made no order as to the costs of the motion. (See 2 H. & M. 254.)

The present bill, which was filed on the 14th of December, 1864, by a holder of 100 shares in the company (purchased on the faith of the statements contained in the prospectus), suing on behalf of himself and all other the shareholders in the East Pant Du Company, except the Defendants, against Merryweather, Whitworth, and the company as Defendants, alleged that none of the shareholders in the company other than the Defendants were desirous that the contract with Merryweather should be carried into effect, or that the relief prayed should not be granted; that the Defendants had altogether 106 votes as shareholders in the company, and obtained the proxies of the other shareholders who voted for the amendment by entering into engagements to indemnify them against loss; "and such votes, together with the aforesaid 106 votes of the said Defendants, constitute a majority of the shareholders' votes in the company."

The bill also alleged, that even without such proxies the 106 votes held by the Defendants made it impossible to obtain a fair decision at a general meeting.

The bill further charged, that the contract was obtained by misrepsesentations as to the value, with full knowledge by the Defendants that the mines were worthless, that £4000 was an exorbitant price for them, and that no other portion of the £7000 was ever intended to be treated as purchase-money of the mines, but was intended to be paid to Whitworth, the Defendants having become promoters of the company solely for the purpose of raising the £7000 for their own private benefit; that these facts were fraudulently concealed from the other directors and shareholders, and that if they had been disclosed the company never would have contracted to purchase the mines. The bill prayed that the contract for the purchase of the mine might be set aside, and a return of the money and shares received by Whitworth and Merryweather; and an injunction to restrain any proceeding to recover the balance of the purchase-money; compensation for all damage and loss occasioned to the company, and, if necessary, that the company might be dissolved and wound up under the direction of the Court.

Mr. Kay, Q. C., and Mr. Fry, for the Plaintiff: -

A sufficient case of fraud, collusion, and suppression has been shewn to enable the Court to set aside the contract, and it is competent for an individual shareholder to maintain a suit for setting aside the contract, even if such suit were opposed by a majority of the shareholders. But that is not the case here, as, by excluding the votes of Merryweather, there is a majority in favour of setting aside the purchase and winding up the company: Bromley v. Smith (1 Sim. 8); Preston v. Grand Collier Dock Company (11 Sim. 327); Hichens v. Congreve (4 Russ. 562); Beck v. Kantorowicz (3 K. & J. 230); Lovell v. Hicks (2 Y. & C. Ex. 46, 481).

Mr. Druce, Q. C., and Mr. A. E. Miller, for Merryweather's assignee:—

Upon the frame of the suit, the contract is not void, but merely voidable, and the majority of the shareholders may confirm it, and bind the whole body for that purpose. The suit, therefore, in its present form, is improperly framed: Foss v. Harbottle (2 Hare, 461, 494); and the proper course would have been for the Plaintiff to have filed a bill for leave to use the name of the company against the parties to the contract. Assuming the price paid for the mine to have been excessive, the Plaintiff may have a case for making the directors account, but that affords him no locus standi as against the vendors for setting aside the contract: Pulsford v. Richards (17 Beav. 87); Fraser v. Whalley (2 H. & M. 10).

Mr. Horsey, for Whitworth's assignee.

Mr. Charles Hall, for the company.

SIR W. PAGE WOOD, V. C.: --

I think that, upon principle, a contract of this kind cannot stand, and that there is not such a defect in the constitution of the suit as would be fatal according to the authority of Foss v. Harbottle (2 Hare, 461).

Looking at the facts as they come out, I am clearly of opinion that this arrangement, by which Merryweather was to have £4000 and

Whitworth £3000, was concealed from everybody, and that Merry-weather assisted in that concealment by allowing his name to appear as the sole vendor, and taking the purchase-money.

Upon such a transaction the Court will hold that the whole contract is a complete fraud. I do not in the least say that where persons with their eyes open know that the agent who secures them the bargain is going to take money for it, that would not be all right enough. If the company knew this gentleman was to have this amount as promotionmoney, well and good. There might have been some difficulty, Mr. Whitworth being a director, if it had been a sale by Merryweather and Whitworth eo nomine, both of them together. If that had been the case more might have been said about the frame of the suit. But here it is a simple fraud, and nothing else. Merryweather knowing Whitworth's position with regard to the company, and that as an honest man Whitworth was bound to tell the company what price he bought the mines for, agreed that the mine should be sold to the company for £7000, and that the real price, £4000, should not be disclosed to the company.

With regard to the frame of the suit, a question of some nicety arises how far such relief can be given at the instance of a shareholder on behalf of himself and other shareholders on the ground that the transaction might be confirmed by the whole body if they thought fit, and that the case would fall within Foss v. Harbottle, according to which the suit must be by the whole company. On the previous occasion, when it was desired to take proceedings to set aside this transaction, a gentleman took upon himself to file a bill in the name of the company. A motion was made to take that bill off the file, as the person filing the bill was not the solicitor of the company, and was not authorized to file the bill, and I ordered the bill to be taken off the file. There was a majority against setting aside this transaction. The number of votes for rescinding the transaction was 324, and 344 the other way. But Merryweather, in respect of the shares obtained by this sale, which I have held cannot stand, had 78 votes, and Whitworth 28, making altogether 106 out of the 344. If I were to hold that no bill could be filed by shareholders to get rid of the transaction on the ground of the doctrine of Foss v. Harbottle, it would be simply impossible to set aside a fraud committed by a director under such circumstances, as the director obtaining so many shares by fraud would always be able to outvote everybody else. I held on a former occasion, and I adhere to that decision, that the Court must first be satisfied that the Plaintiffs were authorized to call themselves the company, the solicitor who put the bill upon the file having no retainer under the corporate seal.

This bill being filed by the Plaintiff on behalf of himself and the other shareholders, it is suggested that the proper course would be to file a bill on behalf of himself and the other shareholders for leave to use the name of the company, in order to set aside that contract. I do not

think that circuitous course is necessary under any circumstances. It is quite clear that it is not necessary here, because in this case the purchase of the mines is the only thing for which this company was incorporated. It appears to me that it would not be competent for a majority of the shareholders against a minority to say that they insist upon a matter of that kind where the whole inception of the company is simply a motion by a fraudulent agent, quà director, to confirm a purchase as made for £7000, which was made for £4000. The whole thing was obtained by fraud, and the persons who may possibly form a majority of the shareholders, could not in any way sanction a transaction of that kind.

I think in this particular case it is hardly necessary to rely upon that, because, having it plainly before me that I have a majority of the shareholders, independent of those implicated in the fraud, supporting the bill, it would be idle to go through the circuitous course of saying that leave must be obtained to file a bill for the company, and pro forma have a totally different litigation. The only course now to take is to set aside the contract for sale and purchase of the mines, and cancel the agreement for such sale. The purchase-money must be repaid with interest, and the share certificates given to Merryweather, delivered up. The profits made by the company to be set off, and the company to have a lien for the balance. I shall also declare that the company ought to be wound up.

FITZWATER v. NATIONAL BANK OF SENECA et al.

1900. Supreme Court of Kansas, 61 Pacific Reporter, 684.1

The National Bank of Seneca brought an action against the State Bank of Seneca, to recover for money loaned. The State Bank made default in the suit. Thereupon certain of its stockholders (a minority) filed a motion to be allowed to defend in the place of the corporation, alleging the lack of power of the corporation officers to incur the obligations sued upon; also that such obligations were given without consideration and in fraud of the corporation and its stockholders; and that the officers of the defendant corporation, being the same as those of the plaintiff corporation and being the ones guilty of the wrongful acts charged, had neglected to defend as they should have done. In connection with the motion to be allowed to intervene, the stockholders tendered a verified answer, setting up all the matters herein briefly mentioned; and asked that they be allowed to file it, and under it be allowed to defend for their corporation.

The case was heard upon the motion for leave to intervene and to

¹ Statement condensed from opinion. - ED.

file the answer. Considerable evidence was taken, much of which tended quite strongly to support the contention of the stockholders.

The court below overruled the motion, and the stockholders brought error.

Doster, C. J. . . .

... the trial that was had was not a final trial, but only a trial of the motion for leave to intervene and have a trial. In other words, the trial that was had was not the trial proper, but was a trial of the preliminary question as to whether a trial should be had.

There can be no question but that stockholders are entitled to defend legal proceedings in behalf of their corporation in case its directors or managing agents are wilfully or fraudulently neglectful of its interests. Mining Co. v. McKibben, 60 Kan. 387, 56 Pac. 756. that case it was said: "If the directors be derelict in their duties, and through wilful neglect, or for a fraudulent purpose, fail to protect the corporate interests, the stockholders may do so in their stead; but, to entitle them to do so, it must be made to appear that the corporate officers who are primarily charged with the duty are wilfully or fraudulently neglectful of it." A proper practice in such cases is for the stockholders to move the court for leave to intervene in the suit they wish to defend, and to allege and show that the authorized and managing agents of the company are derelict in their duties. Before allowing this privilege to the stockholders, the court should require of them a prima facie showing, at least; but that showing need not be more than a prima facie one, — enough to enable the court to conclude that there are reasonable grounds to believe that the corporation defendant has a meritorious defence to the action against it, and that its officers are fraudulently or improvidently neglectful of its interests. showing was made in the case we are considering. Irrespective of the matters of fraud charged in the motion and answer, and to support which there was some showing of testimony, it would seem that, if the National Bank of Seneca was the State Bank of Seneca reorganized, such last-named bank had no authority to contract the obligations sued upon. Rather, it had no existence, and, having no existence, the contracting of a debt cannot be predicated of it. Smith, Dig. Nat. Bank Dec. 215. However, we do not wish to be understood as making such decisions at this time. We only remark, as we did before, that such seems to be the rule of the cases upon the subject. If such be the law, there can be no question, unless some exceptional facts exist, that the old corporation had no power to contract the obligations sued upon, and the stockholders, therefore, would be justified in asking leave to defend. Hence we are of the opinion, upon the showing made, that the court should have sustained the motion of intervention, should have allowed the filing of the answer and the making of an issue thereon, and should have allowed a full trial of the case. To enable such to be done, the judgment of the court below is therefore reversed. All the justices concurring.

DAVENPORT v. DOWS.

1873. 18 Wallace (U. S.), 626.

APPEAL from the Circuit Court for the District of Iowa.

Dows, a citizen of New York, in behalf of himself and all other non-resident citizens of Iowa, who were stockholders in the Chicago, Rock Island, and Pacific Railroad Company, filed a bill in the court below against the city of Davenport, and its marshal, to arrest the collection of a tax, alleged to be illegal, levied by the said city for general revenue purposes, on the property of the company within its limits. The bill assigned as a reason for its being filed by Dows, a stockholder in the company, instead of by the company itself, that the company neglected and refused to take action on the subject. A demurrer was interposed to the bill, which was overruled, and on the defendants refusing to answer over, the Circuit Court ordered that the collection of the tax be perpetually enjoined. From this, its action, the defendants appealed, insisting that the Circuit Court erred in overruling the demurrer, for three reasons:

First. Because the railroad company was not made a party to the bill.

Second. Because the complainant had a complete remedy at / law; and,

Third. Because the tax in question was a proper charge against the property of the corporation.

Mr. J. N. Rogers for the appellants; Mr. T. F. Witherow, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary to notice the last two reasons assigned, why the demurrer should not have been overruled, as the first is well taken. Indeed, it would be improper to pass on the merits of the controversy until the proper parties to be affected by the decision are before the court.

That a stockholder may bring a suit when a corporation refuses is settled in *Dodge* v. *Woolsey*, but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow

^{1 18} Howard, 340.

the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation.¹

In this case the tax sought to be avoided was assessed against the Chicago, Rock Island, and Pacific Railroad Company, and the decree rendered discharges the company from the payment of this tax. The corporation, therefore, should have been made a party to the suit, and

as it was not, the demurrer should have been sustained.

Decree Reversed, and the cause remanded for further proceedings,

In conformity with this opinion.

HAWES v. OAKLAND.

1881. 104 U.S. 450.2

APPEAL from the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. Charles N. Fox for the appellant.

Mr. Henry Vrooman for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree in chancery dismissing the complainant's bill, wherein he, a citizen of New York, alleges that he is a stockholder in the Contra Costa Water-works Company, a California corporation, and that he files it on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the suit.

The defendants are the city of Oakland, the Contra Costa Waterworks Company, and Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, and John W. Coleman, trustees and directors of

the company.

The foundation of the complaint is that the city of Oakland claims at the hands of the company water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers, and the like, whereas it is only

¹ Robinson v. Smith, 3 Paige, 222, 233; Cunningham v. Pell, 5 Id. 607; Hersey v. Veazie, 24 Maine, 1; Charleston Insurance and Trust Co. v. Sebring, 5 Richardson, Equity, 342; Western Railroad Co. v. Nolan, 48 New York, 573; Bagshaw v. Eastern Union Railroad Co., 7 Hare, 114-131.

² Portions of opinion omitted. - En.

entitled to receive water free of charge in cases of fire or other great necessity; that the company comply with this demand, to the great loss and injury of the company, to the diminution of the dividends which should come to him and other stockholders, and to the decrease in the value of their stock. The allegation of his attempt to get the directors to correct this evil will be given in the language of the bill.

He says that "on the tenth day of July, 1878, he applied to the president and board of directors or trustees of said water company, and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said city to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water from the works of said company for any other purpose without compensation; but said board of directors and trustees have wholly declined to take any proceedings whatever in the premises, and threaten to go on and furnish water to the extent of said company's means to said city of Oakland free of charge, for all municipal purposes, as has heretofore been done, and in cases other than cases of fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises said water company and your orator and the other stockholders thereof have suffered, and will, by a continuance of said acts, hereafter suffer, great loss and damage."

To this bill the water-works company and the directors failed to make answer; and the city of Oakland filed a demurrer, which was sustained by the court and the bill dismissed. The complainant appealed.

Two grounds of demurrer were set out and relied on in the court below, and are urged upon us on this appeal. They are:—

- 1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the corporation, and the right to sue belonging solely to that body.
- 2. That by a sound construction of the law under which the company is organized the city of Oakland is entitled to receive, free of compensation, all the water which the bill charges it with so using.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States.

Since the decision of this court in *Dodge* v. *Woolsey* (18 How. 331), the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

This practice has grown until the corporations created by the laws

of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction.

That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this.

This corporation, like others, is created a body politic and corporate, that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do.

Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.

The principle involved in the case of *Dodge* v. *Woolsey* permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing and institute and control a suit in which the rights involved are those of the corporation, and the controversy is one really between that corporation and the other party, each being entirely capable of asserting its own rights.

This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country.

[The learned judge here cited, and commented on, various cases; especially Foss v. Harbottle, 2 Hare, 461; Gray v. Lewis, L. R. 8 Chan. Ap. 1035; MacDougall v. Gardiner, L. R. 1 Chan. Div. 13; and Dodge v. Woolsey, 18 Howard, 331. The opinion then proceeds as follows:

This examination of *Dodge* v. *Woolsey* satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court.

He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or

obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts ultra vires, or of destruction of property, or of irremediable injury of any kind.

Conceding appellant's construction of the company's charter to be correct, there is nothing which forbids the corporation from dealing with the city in the manner it has done. That city conferred on the company valuable rights by special ordinance; namely, the use of the streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was properly sustained, and the bill dismissed, because the appellant shows no standing in a court of equity — no right in himself to prosecute this suit.

Decree affirmed. 1

KNOWLTON, J., IN DUNPHY v. TRAVELLER NEWSPAPER ASSOCIATION.

1888. 146 Massachusetts, 495, p. 498.

Knowlton, J. . . . The only exception to the rule that a stockholder must apply to the directors, and also if need be to the corporation, for redress of a wrong done it, before he can sue in a court of equity, for himself and in behalf of other stockholders, is when it appears that such application would be unavailing to protect his rights.

¹ The following "Additional Rule of Practice in Equity," No. 94, was promulgated by the U. S. Supreme Court, Jan. 23, 1882, and is printed in vol. 104 U. S. Preface, ix.:—

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors of trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

Brewer v. Boston Theatre, 104 Mass. 378. Allen Wilson, 28 Fed. Rep. 667. Hawes v. Oakland, 104 U. S. 450. Detroit v. Dean, 106 U. S. 537. Dimpfell v. Ohio & Mississippi Railway, 110 U. S. 209. Foss v. Harbottle, 2 Hare, 461. That may happen when the directors themselves are the wrongdoers, or are in fraudulent combination with them, or when the corporation is controlled by them, or when it is necessary that action should be taken too speedily to leave time for a corporate meeting of stockholders.

In the case at bar there is an averment that Roland Worthington, the alleged wrongdoer, has for a long time controlled a majority of the stock, and has elected such persons directors as he chose. That states a sufficient reason for not applying to the corporation, at a meeting of its members, for action to redress its wrongs. But it is not alleged that the plaintiff ever attempted to move the directors in the interest of the corporation in the matters complained of, or that any good reason existed for his failure so to do. It does not even appear who or how many the directors are. It is said that the defendants Roland Worthington and Roland Worthington the younger are directors, but no others are named. The law provides that there shall be at least three, and it is to be presumed that there are others besides these defendants. Rev. Sts. c. 38, § 3. Pub. Sts. c. 106, § 25. There is no allegation of fraud, or of wrongful combination with Roland Worthington, or of other misconduct, on the part of any of them. And it cannot be presumed, in the absence of such averments. that they would refuse to do their duty if their attention were called to it.

In Brewer v. Boston Theatre, ubi supra, — a much stronger case for the plaintiff than this, — an allegation was in these words: "A majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of, Tompkins and Thayer," the authors of the alleged frauds; and it was held that this allegation did not set forth a sufficient reason for bringing a suit without first requesting the directors to do it.

Woods, J., ZIEGLER v. LAKE STREET EL. R. CO.

1896. 76 Federal Reporter, 662, p. 663.

Woods, J. . . . We desire to emphasize here the necessity, in suits like this, for a full and unequivocal compliance with the requirements of equity rule 94. As we had occasion to say in *Watson* v. *United States Sugar Refinery*, 34 U. S. App. 81, 88, 15 C. C. A. 662, 666, and 68 Fed. 769, 772:

"The rule is well settled that a stockholder cannot maintain a suit for a wrong to the corporate body without showing either an effort to set the corporation in motion to redress the wrong, an application made to the board of directors to that end, or that such effort or application would be useless; and this requirement is not satisfied by an allegation that the directors, or a majority of them, are acting in the interest or under the control of others, who are charged with the fraud. Brewer v. Proprietors, 104 Mass. 378; Dodge v. Woolsey, 18 How. 331."

A failure to seek action on the part of the corporation itself cannot be excused by vague and general averments of complicity on the part of the directors in the wrongs against which relief is sought.

MENIER v. HOOPER'S TELEGRAPH WORKS.

1874. L. R. 9 Chan. Ap. 350.

THE bill in this case was filed by E. J. Menier, on behalf of himself and all other the shareholders of the European and South American Telegraph Company (except such of them as were Defendants), against a company called Hooper's Telegraph Works, W. Hooper, H. W. Crace, and the European and South American Telegraph Company, and stated (amongst other things) as follows: — That the European Company was incorporated in 1871 with the object of carrying out an agreement between the Plaintiff, Menier, and one Bradford, and others, for constructing a submarine telegraph from Europe to South America, under certain conventions and decrees of foreign governments. The capital of the company was to be £1,250,000, in 62,500 £20 shares, and by the articles of association provisions were made for holding meetings of the company, at which every member was to have one vote for every share held by him. That Hooper's Company were to make and lay down for the European Company telegraph cables from Portugal to Brazil. That a prospectus was issued and many shares were applied for, but in consequence of objections raised the directors determined not to proceed with the allotment to the public, and the only shares allotted were 3000 to Hooper's Company, 2000 to the Plaintiff, and 325 to thirteen persons, ten of whom were the directors. That £3 was paid on each of the shares so allotted. That one of the concessions for making the telegraph had been granted to the Baron de Maua, who was at one time chairman of the European Company, and this concession was claimed by the European Company. That a bill was filed in this Court by the European Company against the Baron de Maua and another company, praying a declaration that the Baron de Maua was a trustee of the concession for the

European Company, and that he might be restrained from transferring it to any one else. That a motion was made for an interlocutory injunction, and was refused by the Vice-Chancellor Malins, but on the balance of convenience only. That the European Company, and also Hooper's Company, at first intended to appeal against the order of the Vice-Chancellor Malins. That Hooper's Company afterwards determined not to appeal, and then the directors of the European Company determined not to appeal, but to take steps for winding up the European Company. That the Plaintiff was resident in Paris and ignorant of English law, and believed that any arrangements adopted by the directors would be for the benefit of the European Company, and not exclusively in the interests of Hooper's Company. That the Plaintiff wished the appeal to proceed, and offered to bear the costs. That on the 12th of February, 1873, an extraordinary meeting of the European Company was held, at which a resolution was passed that the company be wound up voluntarily, and that the Defendant Crace be the liquidator. That the resolution was proposed by one Kennedy, a director of Hooper's Company, and that Crace was secretary of Hooper's Company. That this resolution was confirmed at another extraordinary meeting, at which five persons only were present, of whom three were directors nominated by Hooper's Company, and one was Crace, the That the Plaintiff protested against these proceedings. That the Plaintiff was then ignorant, but had since discovered, that these proceedings took place through the influence of Hooper's Company. The bill then stated the circumstances of an arrangement between Hooper's Company and the Telegraph Construction and Maintenance Company and the Baron de Maua, under which it would be to the advantage of Hooper's Company that the agreement between them and the European Company should be put an end to, in order to benefit Baron de Maua's Company, and in order that Hooper's Cons pany might sell to another company the cable they were making for the European Company. That these arrangements were concealed from the Plaintiff and the other shareholders in the European Company. That Hooper's Company procured the abandonment of the suit against the Baron de Maua, and the winding-up of the European Company, through the influence which they had as holders of 3000 shares in the European Company, and through the influence of the directors nominated by them.

And the bill prayed that Hooper's Company might be declared not entitled to the benefit of the profits derived from the abandonment of the suit and other arrangements aforesaid, and might be declared a trustee of those profits for the Plaintiff and the other shareholders in the European Company; and that the European Company and the Defendants might be restrained from repaying to Hooper's Company any of the money paid on the allotment of shares in the European Company, and from disposing of the property of the European Company.

To this bill the Defendants *Hooper's Company* and *W. Hooper* demurred for want of equity; and the Defendants *Crace* and the *European Company* also demurred, and for cause of demurrer shewed that the Plaintiff had not made out such a case as entitled him to discovery or relief.

The Vice-Chancellor *Bacon*, on the 12th of January, 1874, overruled both demurrers; and the Defendants appealed.

Mr. Fry, Q. C., and Mr. Millar, for Hooper's Company: -

A shareholder has a right to vote as he pleases, and to suit his own interests. If not, the Court in every case might have to interfere wherever there was a small majority, and consider what were the motives of each shareholder. If there was a suit by the company against any individual shareholder, he would not be disabled from voting. He is not a trustee for any one, and he may vote against the interests of the company or of any of the other shareholders. No constructive trust can be raised: Gray v. Lewis. In Atwool v. Merryweather² the vote was impeached. If such a suit can be maintained, one shareholder may file a bill to have a certain contract set aside, and another to have it carried on. Such a suit can only be maintained by the company against the directors. At all events, the proceedings ought to be in the liquidation, and not by bill.

Mr. Kay, Q. C., Mr. Jackson, Q. C., and Mr. Everitt, for the Plaintiff, were not called upon.

SIR W. M. JAMES, L. J.: -

I am of opinion that the order of the Vice-Chancellor in this case is quite right.

The case made by the bill is very shortly this: The Defendants, who have a majority of shares in the company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. Hooper's Company have obtained certain advantages by dealing with something which was the property of the whole company. The minority of the shareholders say in effect that the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged by the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it, and given to them.

¹ Law Rep. 8 Ch. 1035.

² Law Rep. 5 Eq. 464, n.

It is said, however, that this is not the right form of suit, because, according to the principles laid down in Foss v. Harbottle, and other similar cases, the Court ought to be very slow indeed in allowing a shareholder to file a bill, where the company is the proper Plaintiff. This particular case seems to me precisely one of the exceptions referred to by Vice-Chancellor Wood in Atwood v. Merryweather, a case in which the majority were the Defendants, the wrong-doers, who were alleged to have put the minority's property into their pockets. In this case it is right and proper for a bill to be filed by one shareholder on behalf of himself and all the other shareholders.

Therefore the demurrer ought to be overruled.

SIR G. MELLISH, L. J.: -

I am entirely of the same opinion.

It so happens that *Hooper's Company* are the majority in this company, and a suit by this company was pending which might or might not turn out advantageous to this company. The Plaintiff says that *Hooper's Company* being the majority, have procured that suit to be settled upon terms favourable to themselves, they getting a consideration for settling it in the shape of a profitable bargain for the laying of a cable. I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them. I also entirely agree that, under the circumstances, the suit is properly brought in the name of the Plaintiff on behalf of himself and all the other shareholders.

The appeal will be dismissed with costs.

Mr. Fooks, Q. C., and Mr. Davey, for the other Defendants, then submitted to have their appeal dismissed.

Whost definite base in 9. 7

FARMERS' LOAN AND TRUST CO., AS TRUSTEE, v. NEW YORK AND NORTHERN R. CO.

1896. 150 New York, 410.8

Action to foreclose a second mortgage upon the property of the New York and Northern R. Company; the mortgage being given by that corporation to the plaintiff as trustee to secure the payment of bonds. The mortgage provided that no foreclosure could be had until the expiration of one year after default in the payment of the interest. Such default had taken place.

^{1 2} Hare, 461.
2 Law Rep. 5 Eq. 484, n.
3 Statement abridged. Arguments and part of opinion omitted.

The Northern R. Company made no defence. Holmes and Pick, minority stockholders in that corporation, were, on their own motion, made parties defendant in the action, and served an answer.

Upon the trial, the following facts appeared:

The New York Central and Hudson River R. R. Company and the Northern Company are parallel lines and were competing lines. The Central purchased a majority of the stock and a majority of the second mortgage bonds of the Northern for the sole purpose of obtaining control of the property of the latter corporation. The Central, as such majority stockholder, acquired the entire control of the affairs of the Northern; dictating and governing the action of the board of directors of the Northern. The present action was procured to be commenced by the Central.

On the trial, Holmes and Pick sought to prove that after the Central became the owner of such stock and bonds, and while its officers were in substantial control of the Northern, they declined to accept traffic from other roads that would have produced a fund with which to pay the interest due on the bonds; that the income of the road which should have been employed to pay such interest was used for other and improper purposes; and that such action caused the inability of the Northern to pay the interest and thus cure its default. This evidence was rejected as immaterial. Holmes and Pick excepted to the ruling.

The trial court held that the plaintiff was entitled to judgment of foreclosure and sale. This decision was affirmed by the General Term (78 Hun, 213). The minority stockholders appealed from this judgment.

ment.

James C. Carter and Simon Sterne, for appellants.

Ashbel Greene, David McClure, and Thomas Thacher, for respondents.

MARTIN, J. . . . In determining the correctness of the rulings made by the trial court, it becomes necessary to determine incidentally whether a corporation, purchasing a majority of the stock of another competing corporation, may thus obtain control of its affairs, cause it to divert the income from its business, or to refuse business which would enable it to pay the interest for which it was in default, and then institute an action in equity to enforce its obligations for the purpose of obtaining control of its property at less than its value to the injury of the minority stockholders, and they have no remedy. Or, in other words, whether a court of equity, with those facts established, would lend its aid to such a stockholder by enforcing the mortgage and decreeing a foreclosure and sale of the mortgaged premises, at its request, in its behalf, and to accomplish such a purpose. If it would, then the rulings of the trial court were proper; if not, then the appellants were entitled to prove those facts, and it was error to reject the evidence.

[After citing and stating various decisions.]

While the question in some of the cases cited arose between stockholders and the directors and officers of a company, who as such held a position of trust as to the former, still, where, as in this case, a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders, and, therefore, under such circumstances, the rule stated in the Sage and other similar cases applies to majority stockholders who control the affairs of the company, as well as to its directors or officers.

The principle of these authorities renders it quite obvious that a corporation, purchasing a majority of the stock of another competing one, cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders. Such a course of action is clearly opposed to the true interests of the corporation itself, plainly discloses that one thus acting was not influenced by any honest desire to secure such interests, but that its action was to serve an outside purpose, regardless of consequences to the debtor company, and in a manner inconsistent with its interest and the interest of its minority stockholders.

The respondents, however, contend that the doctrine of the authorities cited is not controlling in this case, but that the New York Central and Hudson River Railroad Company had a right to purchase a majority of the stock and bonds of the New York and Northern Railway Company, for the express purpose of obtaining control of the affairs of the latter for its own use and benefit, and to thus acquire

its property at less than its actual value, to the injury of the minority stockholders, and that such stockholders had no remedy in law or in equity to protect themselves against such action of the majority stockholder, although it diverted the income which should have been applied to the payment of such interest to other and improper purposes, and refused business which would have enabled the defaulting company to pay its interest. In other words, the claim of the respondents is, and the General Term in effect held, that the purpose for which the New York Central and Hudson River Railroad Company obtained a majority of the stock and bonds of the New York and Northern Railway Company is entirely immaterial, and that notwithstanding the existence of such a purpose, a court of equity will aid them in enforcing the mortgage. To sustain this contention they cite Morris v. Tuthill (72 N. Y. 575); Phelps v. Nowlen (72 N. Y. 39); Chenango Bridge Co. v. Paige (83 N. Y. 178); Ramsey v. Erie Railway Co. (8 Abb. Pr. [N. s.] 174); Clinton v. Myers (46 N. Y. 511); Simpson v. Dall (3 Wall. 476); Oglesby v. Attrill (105 U. S. 605); Adler v. Fenton (24 How. [U. S.] 407), and Beveridge v. N. Y. E. R. Co. (112 N. Y. 1).

In *Morris* v. *Tuthill* the action was to foreclose a mortgage brought by an assignee. There was no question or principle of trust involved in that case. The plaintiff owed the defendant no duty, and, hence, it was held that under such circumstances the plaintiff had a right to maintain an action for the foreclosure of the mortgage, although he took title to it from motives of malice, and the assignor assigned the mortgage to him from a like motive. That that case was correctly decided we have no doubt, but it is clearly distinguishable in principle from the case at bar, and has no bearing whatever upon the question under consideration.

In the *Phelps* case it was held that a party was not liable for the consequences of an act done upon his own land, lawful in itself, which did not infringe upon any lawful right of another, simply because he was influenced in doing it by wrong and malicious motives, and that courts would not inquire into the motives actuating a person in the enforcement of a legal right. How the doctrine of that case is applicable to the question involved in this, it is difficult to perceive. In that case the party simply exercised a lawful right, and the court held that no liability arose from his having done so. There the plaintiff owed the defendant no duty and sustained no relation of trust towards him, and, hence, it is clearly distinguishable from the case at bar. The same may be said of *Chenango Bridge Co. v. Paige, Ramsey v. Erie Railway Co., Clinton v. Myers, Simpson v. Dall, Oglesby v. Attrill,* and *Adler v. Fenton.* We do not think these cases in any way aid the respondents.

[After discussing the Beveridge case.]

As we have already seen, there are circumstances under which the

majority stockholders occupy substantially the same relation of trust towards the minority as the board of directors would occupy towards the stockholders it represents, and, hence, where there are corrupt motives, personal interest or fraud, the case cited is an authority to sustain the conclusion which we have already reached.

That any person or corporation authorized to do so might have purchased the bonds of the New York and Northern Railway Company, and have rigorously enforced them by a sale of its property, there can be no doubt. They might also have purchased the stock of the company and thus have become the owners of both; and while such owners might have enforced the liability of the company upon its bonds, so long as they acted in good faith and their purpose was proper; but when the New York Central and Hudson River Railroad Company purchased the stock and bonds in question, thus obtaining a controlling interest in the affairs of the New York and Northern Railway Company for the avowed purpose of destroying it, to serve a purpose entirely outside of that for which it was organized, and in hostility to it, it becomes clear that as such stockholder it owed a duty to the minority stockholders, that the law implied a quasi trust upon its part, and that a court of equity will not aid it in the destruction of that corporation and a confiscation of its property, although it held a majority of its stock and the required amount of its bonds.

Hence, we are of the opinion that the court erred in rejecting as immaterial evidence offered by the appellants to show that, after the New York Central and Hudson River Railroad Company became the owner of a majority of the stock and bonds of the New York and Northern Railway Company, and while its officers were in control of the latter corporation and its affairs, it declined to accept traffic from other roads which would have produced a fund with which to pay the interest that was due; that the income of the road, which should have been employed to pay such interest, was used for other and improper purposes, and that such action upon the part of the majority stockholder occasioned the inability of the company to pay the interest and cure the default. To the rejection of this evidence the defendants excepted. We think many of these rulings were erroneous, and that the appellants had the right to make the proof offered, so far as it related to the transaction of the business of the New York and Northern Railway Company during the time the New York Central and Hudson River Railroad Company owned a majority of its stock and controlled its affairs, and for the error in those rulings the judgment should be reversed.

The respondents claim that by virtue of the provisions of section forty of the Stock Corporation Law the New York Central and Hudson River Railroad Company had the right to acquire the stock of the New York and Northern Railway Company. We do not deem it necessary to either discuss or decide that question, for if it be

admitted that the New York Central and Hudson River Railroad Company was authorized to purchase such stock and bonds, still nothing will be found in the statute which authorizes it to employ them for the purpose of destroying the property of the New York and Northern Railway Company to the injury of its minority stockholders.

If the New York Central and Hudson River Railroad Company had a right to purchase the stock and bonds of the New York and Northern Railway Company, it obtained no better title and secured no greater right than any other stockholder would have acquired under a similar purchase. The right to purchase, even if given by statute, conferred upon the purchaser no authority to employ the stock and bonds for purposes condemned by the principles of equity.

Judgment reversed. New trial granted. 1

JESSEL, M. R., IN RUSSELL v. WAKEFIELD WATER-WORKS CO.

1875. L. R. 20 Eq. Cases, 474, 478-483.

SIR G. JESSEL, M.R. A great deal of the argument in this case turned upon what may be described perhaps, in one sense, as a technical objection, but which is a very formidable and important objection. It was said that this is a bill to make a stranger pay back money belonging to a company which the stranger has illegally or improperly possessed himself of, or appropriated to his own use, and that any person who takes possession of a trust fund is liable to be sued in equity by the owner of the trust fund if he had notice at the time that it was a trust fund; and although he gave value, still in that way the bill can be maintained against him.

The answer was, that where the owner of the trust fund is an incorporated company, the corporation is the only party to sue; the stranger has nothing whatever to do with the individual corporators; and although in a sense it is their property, because individual corporators make up the corporation, yet in law it is not their property, but the property of the corporation, and therefore the right person to sue

1 Where the managers of a railroad corporation, acting in its interests, buy a controlling interest in the stock of a connecting road for the purpose of making with themselves as controlling managers of the latter road contracts more favorable to the former, and accomplish their purpose, the question whether the contracts thus obtained are fair and just is immaterial in a stockholder's injunction suit to restrain the carrying out of the contracts. Pearson v. Concord R. R., A. D. 1883, 62 New Hampshire, 537. The contracts will be annulled, at the instance of minority stockholders in the corporation thus controlled, without regard to the question whether the controlling corporation was guilty of actual fraud. Glengary \$c. Co. v. Boehmer, Supreme Court of Colorado, A. D. 1900, 62 Pacific Reporter, 839. See Stewart v. Lehigh Valley R. Co., ante, 397, and note 1, p. 399. — ED.

is the corporation, who is the cestui que trust or equitable owner of the fund. That I take to be the general rule of this Court. In this Court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee.

But the general rule being that the cestui que trust must sue, and not the individual corporator who has only an ultimate beneficial interest, the only point remaining to be considered is, whether there are any exceptions to the general rule.

[After referring to the general rule laid down in Foss v. Harbottle, 2 Hare, 461.] But that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case; that is, the necessity for the Court doing justice.

It remains to consider what are those exceptional cases in which, for the due attainment of justice, such a suit should be allowed. We are all familiar with one large class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill, indeed, may be maintained by a single corporator, not suing on behalf of himself and of others, as was settled in the House of Lords in a case of Simpson v. Westminster Palace Hotel Company. If the subject matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation or some other person strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a Defendant to the suit, because that other corporation or person has an interest, and a great interest, in arguing the question and having it decided, once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member. So that in these cases you must always bring before the Court the other corporation.

The cases are so numerous on this subject, that one ought not perhaps to refer to them. But I may mention a few of them. There is, first, the well-known case of Hare v. London and North-Western Railway Company; there is the case of Simpson v. Denison; there is a case of Beman v. Rufford; and a vast number of cases as regards agreements between Railway companies which have been held to be ultra vires. When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you

are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the ultra vires agreement. You may be entitled to have money paid back which has been paid under the ultra vires agreement, as in the case of Salomons v. Laing, and you may be entitled to have property returned or other acts done. If the detainer or holder of the money or property, that is, the second corporation or other person, is already a party, and a necessary party, to the suit, it would be indeed a lame and halting conclusion if the Court were to say it could do justice in a suit so framed by ordering the money to be returned or the property restored. It is a necessary incident to the first part of the relief which can be obtained by individual corporators, and will do complete justice on each side, and that has always been the practice of the Court. Therefore, in a case so framed there is no objection to a suit by an individual corporator to recover from another corporator, or from any other persons being strangers to this corporation, the money or property so improperly obtained. But that is not the only case. Any other case in which the claims of justice require it is within the exception.

Another instance occurred in the case of Atwool v. Merryweather,2 in which the corporation was controlled by the evil-doer, and would not allow its name to be used as Plaintiff in the suit. It was said that justice required that the majority of the corporators should not appropriate to themselves the property of the minority, and then use their own votes at the general meeting of the corporation to prevent their being sued by the corporation, and consequently in a case of that kind the corporators who form part of the minority might file a bill on their own behalf to get back the property or money so illegally appropriated. It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit. As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain the generality of the terms made use of by the learned judge who decided the case of Foss v. Harbottle.3

^{1 12} Beav. 377. 2 Law. Rep. 5 Eq. 464, n.

⁸ In Alexander v. Atlantic & W. P. R. Co., Supreme Court of Georgia, 1901, 38 Southeastern Reporter, 772, minority stockholders petitioned for an injunction to restrain the

WILLOUGHBY v. CHICAGO JUNCTION, &c. CO.

1892. 50 New Jersey Equity (5 Dickinson), 656.1

On rule to show cause why an injunction should not issue. Heard on bill, supplemental bill, answers and affidavits, and on subsequent stipulation that the cause should be disposed of as having been heard on final hearing.

The original bill was filed Dec. 17, 1891, by Willoughby, on behalf of himself, as a stockholder in the Chicago Junction &c. corporation (called by the court the New Jersey Co.), and all other stockholders therein, who should come in and contribute to the expense of the suit. Three other stockholders were afterwards, by an order of court, admitted as parties complainant. The aforesaid corporation and certain other parties were made defendants. The object of the original bill was to restrain defendants from carrying into execution an agreement between the New Jersey Co. and certain other defendants, dated July 27, 1891. Before a hearing on this bill, another agreement was entered into between the New Jersey Co. and the same parties, dated Jan. 15, 1892, which, while it contained many of the provisions of the former agreement, yet by its fourteenth paragraph expressly annulled such former agreement. Thereupon Willoughby and his three co-plaintiffs, by leave of the court, filed a supplemental bill against the same defendants, setting out the fact of the original suit, and, as far as proper, incorporating the original bill, and seeking to restrain the carrying into effect both the agreement of Jan. 15, 1892, and that of July 27, 1891.

Ellerman, another stockholder of the New Jersey Co., on Aug. 19, 1891, filed a bill in this court, on behalf of himself, and of all other stockholders who should come in and contribute to the expense of the suit, for the purpose of preventing the consummation of the same agreement of July 27, 1891. Ellerman's suit was heard before a vice-

company from building a belt line of railroad under a charter amendment, which had recently been granted by the Secretary of State upon the application of a majority of the stockholders. After the court had decided that the amendment was invalid in the absence of the unanimous assent of the stockholders and that the injunction should be granted, the plaintiffs claimed that the company should be compelled to pay the fees of the plaintiffs' counsel. This claim was disallowed. The court said that the plaintiffs had not sued in the right of the corporation, but in their own right as stockholders. They were not compelled to ask the corporation to sue or to show a reason for not so asking. The gist of their complaint was that the building of the belt line would violate the rights which inhered in the ownership of their stock. The suit of a stockholder in such a case is based upon the contract which the law implies as existing between the corporation, the other stockholders, and himself. It is unlike the case where the stockholder is permitted to sue in the right of the corporation to undo a wrong done to the corporation. In the latter case his suit is not based on the theory that his rights have been directly violated. The corporation itself would be the proper plaintiff; and it is only when the corporation virtually refuses to sue that the stockholder is permitted to sue in its behalf. - ED.

¹ Statement abridged. Portions of opinion omitted, - ED.

chancellor on bill and answers; an opinion was filed Dec. 18, 1891 (49 N. J. Eq. 217), holding that said agreement was not *ultra vires* the corporation and not illegal; and a decree was entered dismissing the bill on that ground.

Aaron P. Whitehead, Frederic W. Stevens, and Thos. N. McCarter,

for plaintiffs.

R. Wayne Parker, Cortlandt Parker, Joseph H. Choate, Wm. D. Guthrie, and Barker Gummere, for various defendants.

GREEN, V. C. [After stating the case.] Assuming that such decree is not impeachable for fraud, collusion or other vice, to what extent, if at all, is the decision of questions in the Ellerman suit conclusive in this action?

Mr. Black, in his work on *Judgments*, thus states the general rule (§ 504):

"A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different."

As the rule in question is generally stated, the former judgment is binding only on parties and their privies, but the course of decision has been such as to embrace others who do not stand in a relation, strictly speaking, of privity with the original party, as a sheriff and his deputy, King v. Chase, 15 N. H. 9 (41 Am. Dec. 657); master and servant, in an action of trespass, Emery v. Fowler, 39 Me. 326 (63 Am. Dec. 627); the joint and several makers of a promissory note, Spencer v. Dearth, 43 Vt. 98; the true owner, and the bailee of complainant, Bates v. Stanton, 1 Duer. 79; a chattel mortgagee and the vendee of the mortgaged goods, Atkinson v. White, 60 Me. 396; a town and parties alleged to have caused an obstruction to the highway, in an action for negligence, Hill v. Bain, Town Treas., 15 R. I. 75 (23 Am. Rep. 44); see, also, Durham v. Giles, 52 Me. 206; Freer v. Stotenbur, 2 Abb. Ct. of App. Dec. 189.

Chief Justice Durfee, in \widetilde{Hill} v. Bain, referring to some of the cases, says (at p. 77):

"In these cases the defendants were permitted to avail themselves, by way of estoppel, of judgments to which they were neither parties nor privies. The ground on which this was permitted seems to have been that the defendants, though not parties to the judgments, were so connected in interest or liability with the parties that the judgments, when recovered, could be regarded as virtually recovered for them, for the purposes of estoppel, as well as by and for the parties of record."

Black on Judgments (§ 537) thus states the rule as to the parties affected:

"It is not always necessary that the parties to the two suits should be nominally the same in order that one recovery may bar another.

It is in general sufficient if they are really and substantially in interest the same."

And Mr. Freeman, in his work on Judgments, thus (§ 154):

"Persons who were parties to the suit, or in privity with such party, or in such a position that they were the real parties in interest in the litigation conducted for their benefit in the name of another, under such circumstances as to make them answerable for the result of the litigation by virtue of the principles to be hereinafter stated."

The practice has long been recognized of permitting suit to be brought by a few as the representatives of a numerous class, on behalf of themselves and all others of the class, when there is a common interest or a common right which the suit seeks to protect, and against a few as representing a numerous class subject to a common liability which the suit seeks to enforce. Story Eq. Pl. § 97.

"In most, if not in all, cases of this sort, the decree obtained upon such a bill will ordinarily be held binding upon all other persons standing in the same predicament, the court taking care that sufficient persons are before it, honestly, fairly and fully to ascertain and try the general right in contest." Story Eq. Pl. § 120.

[The learned Judge then stated the cases of Harmon v. Auditor, 123 Ill. 122; Gaskell v. Dudley, 6 Metcalf, 546; and Davey v. St. Albans Trust Co., 60 Vt. 1.]

None of these cases, it is true, is exactly in point, but they show clearly how elastic is the rule limiting the conclusive character of judgments to parties and their privies. How does the question stand on principle?

Actions of the class to which the Ellerman and Willoughby suits belong are sui generis, in this, that the complainant does not prosecute in his own right - a stockholder, as such, does not have a legal or equitable estate in the corporate property; his only right of property is to a proportionate share of the profits of the business while the company is in operation, and to a proportionate share of the net assets on its dissolution. Unauthorized dealing with the franchises or funds of the corporation directly injure it as a legal entity; it is the franchises of the corporation which are to be misused, the funds of the corporation which are to be misappropriated, and the corporation is, therefore, the party to be injured and should itself seek redress. This class of cases must not be confounded with the preventive remedy of every stockholder to restrain acts ultra vires the corporation. While "the directors are quasi or sub-modo trustees for the corporation with respect to the corporate property, they are also quasi or sub-modo trustees for the stockholders with respect to their shares of the stock." 3 Pom. Eq. Jur. § 1090.

Each stockholder has invested his money in the very enterprise contemplated by the charter, and has, in his own right, an equitable remedy to prevent his *quasi*-trustees, as directors, from misuse of the corporate franchises, and from diversion of corporate funds, to a pur-

pose foreign to that of the charter, and for which he has invested his money, and this although every other stockholder favors the proposed action, and it is plainly advantageous to the financial interests of the company.

The Ellerman and Willoughby suits belong not to this, but to that class of cases in which the corporation itself is directly injured and is primarily interested, and should itself institute and maintain an action for relief; in which the remedy to be obtained, whether pecuniary or otherwise, is for its benefit and belongs to it alone; the stockholder in such case has no standing in the court, as a party, except on the refusal, either express or implied, of the corporation itself to prosecute.

Where, as in this case, an appeal to the directors to bring suit would apparently be unavailing, refusal to prosecute is implied, and a stockholder is permitted to commence the action in his own name; but otherwise the suit is treated in every respect as one brought by and for the corporation; although the stockholder is the nominal, the corporation is the real party complainant, represented not by its accustomed officials, but by one or more of its stockholders.

Professor Pomeroy (3 Eq. Jur. § 1095) says, with reference to such a suit:

"Wherever a cause of action exists primarily in behalf of the corporation against directors, officers and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation either actually or virtually refuses to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors, officers and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party - usually as a co-defendant. The rationale of this rule should not be misapprehended. The stockholder does not bring such a suit because his rights have been directly violated, or because the cause of action is his, or because he is entitled to the relief sought; he is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. The stockholder, either individually or as a representative of the class. may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation; it is maintained directly for the benefit of the corporation. and the final relief, when obtained, belongs to the corporation and not to the stockholder-plaintiff. The corporation is, therefore, an indispensably necessary party, not simply on the general principles of equity pleading, in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy, nor in the relief. In fact, the plaintiff has no such direct interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, not-withstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice."

Cook on Stockholders (1st ed.) § 692, says:

"The rule that the corporation itself is an indispensable party defendant to such suit, is due to the fact that all other possible future suits by the corporation are thereby prevented, the rights of the corporation are duly ascertained, and the remedy made effectual against the corporation as well as others."

Neither this suit nor the Ellerman suit was in the right of the respective complainants; they were the nominal, but not the real, parties complainant. They were suing merely as representing the company, to establish and enforce its rights; the relief to be obtained was not and is not for their individual benefit, but for the benefit of the corporation as such. In these cases the corporation itself is a necessary and was and is actually a party defendant; in these it was and is represented by counsel, answered the bills and has taken part by counsel, in the discussion of the case. The decree in the Ellerman suit certainly binds the company. In the face of that decree, neither the old nor a new board of directors could attack it except by an appeal. The former decree could be successfully pleaded as a bar to an action instituted in the name of the company by authorized agents who might desire to relitigate the questions decided. If the company and its authorized representatives are then concluded by such a decree, how can a stockholder, suing in behalf of the company, be permitted to relitigate questions which are conclusive upon the corporation? A stockholder has no standing in the court to prosecute such an action except on the refusal of the directors, either actual or presumptive, to prosecute. But such refusal of the directors to prosecute must be an unjustifiable refusal. If their reason for not doing so is a valid one. the individual stockholder cannot, from such refusal derive a right to prosecute in his own name. It would not be unreasonable or unjustifiable for a board of directors to refuse to prosecute, on the application of a stockholder, when there had been an adjudication on the point which he seeks to have passed upon, which is conclusive upon the company. And if the stockholder in the face of a refusal by the directors on that ground should persist and commence the action, an answer by the directors in his suit, that they had refused to bring the action solely on the ground that the question had been before adjudicated, would necessarily be followed by a dismissal of his bill. argument goes to the root of this question, and demonstrates that the decision of questions litigated in this court in the suit brought by Ellerman, a stockholder, in his own behalf and that of other stockholders, in which the company was made a defendant and appeared,

is conclusive in another suit brought by another stockholder for the purpose of relitigating the questions which have been determined. If not so there can be no end of litigation, for the court is then open to suit by every stockholder, *seriatim*, presenting the questions over and over for consideration and decision.

In Daunmeyer v. Coleman, 11 Fed. Rep. 97, Sawyer, C. J., says: "By reference to Burke v. Flood, supra, it will be seen that a similar suit for these same grievances was brought by a single stockholder, Burke, on behalf of himself and all other stockholders—and it is a notorious, historical fact, of which the daily newspapers have been full, that these are not the only suits brought in the same way for the same grievances. Is each holder of one of these five hundred and forty thousand shares of stock entitled to bring a suit in equity on behalf of himself and all other stockholders for an account of their transactions? Or, where such a suit has been brought by one stockholder, must the others come in and seek their relief in that suit? If each stockholder is entitled to bring such a suit, then there is something wrong in the law, and the sooner the supreme court by rule, or congress by statute, regulates the matter the better it will be for the due administration of justice."

It is urged that no party should be concluded without an opportunity to be heard; but this complaint does not lie in the mouth of Mr. Willoughby. He had an opportunity to be heard in the Ellerman suit. It was expressly for the benefit of all stockholders who might come in and contribute to its expense. He could, at any time before decree, have been made a party to the Ellerman suit, and have then advised the court of anything not before brought to its attention.

He had ample time to so apply after he actually knew of the pendency of the suit, and his solicitor was thoroughly informed of all proceedings in the Ellerman case in time to have intervened. Counsel admitted, upon the argument, that the question whether they should intervene in the Ellerman suit, or resort to an independent action, was considered and discussed before bringing the present suit was determined upon.

Besides, from the very form and nature of these suits, each stockholder must be considered as represented, for if he is in sympathy with the complainant he may become a party complainant by application to the court; if he is in sympathy with the threatened action of the company, he is represented by and in the corporation which is a necessary party to the suit. March v. Eastern R. R. Co., 40 N. H. 548. Not only this, but the court may, if satisfied that the interests of the corporation are not being properly presented or protected, admit a stockholder to be made a party defendant. Bronson et al. v. La Crosse & M. R. R. Co., 2 Wall. 283.

[The learned judge then held, that the charge that the Ellerman suit was collusive was not sustained; and said: "The Ellerman suit, not being collusive, must be held to be conclusive in this, upon all questions

which were therein decided, . . ." He then proceeded to consider the matters which arise under the contract of Jan. 15, 1892, not passed on in the former suit, and which are the subject matter of the supplemental bill.]

Bill and supplemental bill dismissed.

: VAN FLEET, V. C., concurred.

TOMKINSON v. SOUTH-EASTERN RAILWAY CO.

1887. L. R. 35 Chan. Div. 675.1

This was a motion by the Plaintiff, a holder of £500 deferred ordinary stock of the $South-Eastern\ Railway\ Company$, for an injunction to restrain the company and its directors, officers, servants, and agents, until the trial of the action or further order, from subscribing, advancing or paying, out of the moneys of the company, the sum of £1000, or any other sum, by way of donation, or otherwise, to or for the purposes of the *Imperial Institute*, or to any person or persons on behalf of the *Institute*.

At a meeting of the stockholders or "proprietors" of the South-Eastern Railway, held on the 5th of March, 1887, to consider a circular issued by the executive council of the Imperial Institute to the South-Eastern and other railway companies, inviting them to subscribe to the funds of the Institute, the following resolution was passed, on the motion of the chairman of the company: "That the directors be authorized, either by way of donation from the company or by an appeal to the proprietors, as they may be advised, to subscribe the sum of £1000 to the Imperial Institute: provided, that any shareholder who declines to be a party to any such donation shall have his proportion returned to him with his next dividend warrant."

The resolution was carried by 10,229 votes, representing £1,209,035 ordinary stock of the company, against 175 votes, representing stock to the amount of £13,500.

The Plaintiff was not himself present at the meeting, but, having read a report of the proceedings, he, on the 11th of March, wrote to the secretary of the company protesting against the proposed application of any of the company's funds towards the *Imperial Institute*, and threatening legal proceedings. In his reply the secretary pointed out that the directors were accustomed to act in obedience to the orders of their shareholders, and not otherwise, and that, having regard to the amount of the Plaintiff's holding, his interest in the contribution of £1000 would be represented by about 13d.

¹ Part of opinion omitted. -- Ep.

After some further correspondence the Plaintiff commenced this action, and now moved as above stated.

In an affidavit in opposition to the motion, the company's general manager stated that, in recommending the proprietors to contribute to the funds of the *Institute*, the directors desired to further its establishment in the belief that a great number of visitors would thereby be drawn from the districts served by their railway and their traffic largely increased; and that, inasmuch as the previous exhibitions at *South Kensington* had, by the issue of through tickets from their system of railways, increased the traffic revenue of the company by several thousands of pounds, the directors believed that the establishment of the *Institute* at *South Kensington* would lead to a similar result. The affidavit further stated that railway companies in general had been accustomed to contribute to the funds of objects likely to encourage traffic upon their lines, such as race-meetings and regattas, and also to hospitals and other public institutions which might benefit their employés.

A. Young, for the Plaintiff: -

The proposed subscription is clearly *ultrà vires*, it not being one of the objects for which the company was incorporated to promote or support popular exhibitions.

Sir R. Webster, A. G., C. T. Mitchell, and Worsley Taylor, for the Defendants:—

It is not ultrà vires of a company to expend its funds for the advantage of its undertaking. A company has inherent power to do whatever may be conducive to its popularity or to the objects of its undertaking: Taunton v. Royal Insurance Company; Hampson v. Price's Patent Candle Company; Hutton v. West Cork Railway Company; Pickering v. Stephenson. As the company are not, we submit, acting ultrà vires, the Court will not interfere in their internal affairs: Foss v. Harbottle; Pickering v. Stephenson. Even if the proposed subscription is ultrà vires, the damage to the Plaintiff is so infinitesimal that the case is not one for an injunction.

KAY, J.: -

I have no doubt that it is the duty of the Court to grant an injunction in this case.

The question, as the Attorney-General said, is whether the act proposed to be done is within the powers of the railway company, or outside its powers. If it is outside its powers, it is now perfectly settled that any one shareholder may come to this Court and say, "This company is going to do an act which is beyond its powers: stop it;" and the Court thereupon has no discretion in the matter.

Now, what is proposed to be done here is this: the chairman of the

^{1 2} H. & M. 135.

^{8 23} Ch. D. 654.

^{6 2} Hare, 461.

² 45 L. J. (Ch.) 437.

⁴ Law Rep. 14 Eq. 322.

⁶ Law Rep. 14 Eq. 339.

railway company, at a meeting of the company, proposed this resolution: "That the directors be authorized, either by way of donation from the company or by an appeal to the proprietors, as they may be advised" — the resolution thus proposing two alternative modes — "to subscribe the sum of £1000 to the Imperial Institute." I pause there. The Imperial Institute has no more connection with this railway company than the present exhibition of pictures at Burlington House, or the Grosvenor Gallery, or Madame Tussaud's, or any other institution in London that can be mentioned. The only ground for the suggestion that this company has the right to apply its funds, which it has been allowed to raise for specific purposes, to this purpose, is, that the Imperial Institute, if it succeeds, will very probably greatly increase the traffic of this company. If that is a good reason, then, as I pointed out during the argument, any possible kind of exhibition which, by being established in London, would probably increase the traffic of a railway company by inducing people to come up to see it, would be an object to which a railway company might subscribe part of its funds. I never heard of such a rule, and, as far as I understand the law, that clearly would not be a proper application of the moneys of a railway company. I cannot distinguish this case from that at all, though, of course, I do not mean to disparage the enormous importance of the Imperial Institute. It may be established for the highest possible objects of interest to this country; but still, the only reason given to me why this railway company thinks it right to spend part of its funds in subscribing to it is this, that it will probably greatly increase the traffic of the company by inducing many people to travel up to visit this Institute. I cannot accept that as a reason for a moment. Therefore, as at present advised, it seems to me that this is ultrà vires.

Before I go further I will read the rest of the resolution: "Provided, that any shareholder who declines to be a party to any such donation shall have his proportion returned to him with his next dividend warrant." That means this: "We, the directors, propose to spend money which ought to be divided among you, the shareholders, in paying a subscription to this Institute: if you do not like it, we admit you have a right to object, and your proportion will be returned to you with your next dividend warrant." This shareholder says, "I do not want my money spent in that way;" and he is right, if it is beyond the powers of the company, in saying that the money shall not be spent in that way. Moreover, his objection is not confined to his own share. It is said that his share of the subscription would be comparatively trivial; but, if the subscription is ultrà vires, the company ought not to spend a farthing of their funds on the Institute. His objection is to the whole expenditure.

Now the cases which have been cited really seem to me to be authorities directly against this proposed application of the company's funds. [The learned Judge then cited and commented on Taunton v. Royal Ins. Co., 2 H. & M. 135; Hampson v. Price's Patent Candle Co.

45 L. J. (Chan.) 437; and Hutton v. West Cork R. Co., L. R. 23 Chan. Div. 654; and then continued as follows:

I do not think I need refer particularly to *Pickering* v. *Stephenson*.¹ There what was done was decided to be *ultrà vires*, but seeing that the amount which the plaintiff would be entitled to recover was exceedingly minute, the Court would not make an order for payment back to him of the moneys improperly expended.

Does any one of those cases touch the present? Certainly, I should be the last Judge on the bench to extend the meaning of those cases. It is absolutely necessary to keep incorporated or joint stock companies within the limits of their powers. That is a rule which has been recognised over and over again. To say that, because the authorities which have been referred to have held that the acts there done were within the limits of the powers of the company in each case, therefore it follows that any expenditure which may indirectly conduce to the benefit of the company is *intra vires*, seems to me extravagant.

I know of no authority whatever for saying that the payment of £1000 out of the funds of this company as a subscription to the Imperial Institute would be within the powers of a railway company. I might stop there, because, this being an application for an interlocutory injunction, I am bound, if I felt difficulty upon the question, to restrain the matter until the trial of the action; but my present opinion is entirely against the validity of this act.

Therefore, it seems to me I am clearly bound to restrain, until the trial of this action, the expenditure of this money out of the company's funds.

An alternative is suggested, as I pointed out, in the resolution inviting the individual proprietors to sanction this payment out of their funds, because it says "either by way of donation from the company or by an appeal to the proprietors, as they may be advised." An appeal to the proprietors means an appeal to subscribe £1000, which they are invited to give to the *Imperial Institute*. To that no kind of objection could be made; but this case has been argued on the footing that the alternative adopted by the directors has been, not to take that step, but to apply the moneys of the company. That, it seems to me, the Court is bound to restrain them from doing, and I therefore grant an injunction in the terms of the notice of motion, the Plaintiff giving the usual undertaking in damages.

FORREST v. MANCHESTER, &c. RAILWAY CO.

1861. 4 De Gex, Fisher & Jones, 125.1

This was the appeal of the plaintiff from the dismissal of his bill by the Master of the Rolls. The plaintiff was a shareholder in the Manchester &c. Railway Co.; and sued, on behalf of himself and the other shareholders of the company, for an injunction to restrain the defendants from conveying in vessels or boats passengers, cattle, or goods from Hull or Grimsby to Spurn Point.

The bill alleged that the traffic sought to be restrained was beyond the powers of the company under their Act, and was also prejudicial to another company called The "Gainsborough United Steam Packet Company, Limited," in which the plaintiff was a large shareholder.

The answer stated, inter alia, that the suit was not for the benefit of the other shareholders of the company on whose behalf the plaintiff held himself out as suing, but was instituted solely to promote and serve the interests of the Gainsborough United Steam Packet Company Limited, and that all the other shareholders of the defendants' company were opposed to the suit.

Evidence was gone into, and the plaintiff on his cross-examination admitted, that he held only 82l. stock in the railway company, but was the holder of twelve 30l. shares in the packet company, which was paying a dividend of 10l. per cent; and that the excursion traffic had been continued for eight or ten years. He also admitted that the directors of the packet company had directed the institution of the suit, and indemnified him against costs. The Master of the Rolls dismissed the bill on the ground that the Act sought to be restrained was not ultra vires.

Selwyn, and E. K. Karslake, for appellant. [Citations omitted.] The Solicitor General (Sir R. Palmer) and Fischer, for respondents, were not called upon.

The Lord Chancellor [Westbury]. In this case I am asked to reverse the order of the Master of the Rolls dismissing this bill with costs. I desire it to be distinctly understood that my decision does not proceed upon the grounds stated by the Master of the Rolls. It is unnecessary for me to express any opinion upon the grounds stated by his Honor which, if they are correct, would be confined entirely to this particular case, because they have reference to the peculiar constitution of the present company. But the ground upon which I proceed is entirely that of personal exception to the character of the plaintiff, and the foundation of my decision is contained in this passage of the plaintiff's own examination not attempted to be qualified or questioned. He says in that examination "The directors of the packet company

Statement abridged. — ED.

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directed the institution of this suit and indemnify me against costs." It is not that they persuaded him to institute the suit, not that they instigated the suit, but that the directors of the other company have "directed the suit," and are to indemnify the plaintiff against the costs of it. To use a familiar expression, the plaintiff is the puppet of that company. It has been a very wholesome doctrine of this Court that one shareholder having in view the legitimate purposes of the company may be permitted in this Court to maintain a suit on behalf of himself and the other shareholders of the company, but the principle upon which that constructive representation of the shareholders is permitted indisputably requires that the suit shall be a bona fide one, faithfully, truthfully, sincerely directed to the benefit and the interests of those shareholders whom the plaintiff claims a right to represent. But can I permit a man who is the puppet of another company to represent the shareholders of the company against whom he desires to establish the interests and benefits of a rival scheme? That would be entirely contrary to the principle upon which this constructive representation has been permitted to be founded. When the plaintiff sues in that capacity any personal exception to the plaintiff remains, and it would be in direct contradiction of every principle of truth and justice if I permitted a man to come here clothed in the garb of a shareholder of company A., but who is in reality a shareholder in company B., and has no sympathy whatever with, no real purpose of promoting the interests of the other company. Such a thing would be so much at variance with the principles of a Court of Equity that it would be impossible for it to entertain a suit of that description which is a mere mockery, a mere illusory proceeding.

It is, however, said that this objection was considered some years ago in the well-known case of Colman v. The Eastern Counties Railway Company,1 and was overruled by the late Master of the Rolls, Lord LANGDALE. All I mean to say about that case is that the objection there proceeded upon a different ground. The proposition of Lord LANGDALE is that it is no ground of personal exception to a plaintiff that he has been instigated to institute his suit by another company. If the proposition be limited to the extent of the words in which it is expressed, possibly there may be no exception to that proposition, but undoubtedly I would not assent to it if carried one jot beyond those limits. I desire, however, to point out again the wide difference which exists between a suit "directed" to be instituted by the directors of another company, and a suit which is bona fide instituted by the plaintiff, persuaded only to the institution of it by the arguments of another company. In the one case the suit is the suit of the plaintiff, and is for ought that appears instituted at the peril of the plaintiff. In the other case, the whole origin of the suit and the direction and conduct of it emanate altogether from the other company, and the suit would have no existence whatever but for the order of the other company. I consider, therefore, that the language in which the Master of the Rolls expresses himself upon the proposition then submitted to him does not in the smallest degree interfere with or weaken the ground that I have taken.

I have nothing to do with the motives of plaintiffs suing in this Court. If they come here in a bond fide character, the reason for their coming here is a matter beyond the province of a Court of Justice to inquire into.1 But if a man comes here representing to me that he is a bonâ fide shareholder in a company, and that it is the bonâ fide suit of that company, and it turns out not to be the suit of that company, but in reality to be in its origin and its very birth and creation the suit of another company, then I repeat that this is an illusory proceeding, and ought not to be attended to by the Court. The well-known words, the trite quotation, - will occur to the minds of those who hear me. "Fabula non est judicium in scenâ non in foro res agitur." If this gentleman be permitted to come and assume merely for the purpose of coming into this Court the garb of a shareholder, but at the same time explicitly announces, "This suit is not directed to the purposes of that company; I have nothing in common with the shareholders of that company; it has not emanated from the wish of the shareholders; it does not emanate from me as a shareholder; it is not my act: I am directed to do it by another party, and another body of men," then in point of fact the suit is not the expression of his own will, nor is it the legitimate prosecution of his own interests or his own objects, but it is the prosecution of the interests and objects of persons who have no right whatever to invoke the interference of this Court.

I treat this suit as an imposition on the Court. By these words I mean no reflection upon the plaintiff himself, because he has told the truth, and does not appear at any time to have desired to conceal it. But as he comes here in the character of a shareholder in the company, and tells me frankly that the institution of the suit is not his own act, but an act that he has been directed to do by the other company, then, using the words without offence, I denominate that suit an imposition on the Court, and I dismiss it accordingly, and affirm, though on a different ground, the order that has been made.

I refuse this application with costs.

¹ See Kerr Inj. 549.

SEATON v. GRANT.

1867. L. R. 2 Chan. Ap. 459.1

This was an appeal from an order made on the 12th of February, 1867, by Vice-Chancellor *Malins*, refusing an application of the Defendants that the bill might be taken off the file, or that all further proceedings might be stayed.

The bill was filed by Charles Seaton, on behalf of himself and all other shareholders in the Credit Foncier and Mobilier of England, Limited, except the Defendant, Albert Grant, against Albert Grant, George Edward Seymour, and the above-named company, under the following circumstances:—

The Defendant, Albert Grant, was the managing director of the above-named company. The Defendant, George Edward Seymour, was the chairman of a company called the City of Milan Improvements Company. The Plaintiff alleged that the two last-named Defendants had, in the year 1865, formed what is called a "syndicate" on the Stock Exchange; that is, a combination for the purpose of raising the value of the shares of the Milan Company to a fictitious premium; and that, with this end, Grant had purchased 12,129 shares in the Milan Company, and paid for them out of the funds of the Credit Foncier, by which the latter company had sustained a great loss, the shares of the Milan Company having fallen very much in value.

He also alleged that the Defendants were taking measures to reconstitute the *Credit Foncier*, by dissolving the company, and transferring its assets and liabilities to a new company.

The bill prayed that the Defendants, Grant and Seymour, might repay to the Credit Foncier the money expended in the purchase of the shares in the Milan Company, and that the Credit Foncier might be restrained from handing over their assets to any other company, until all their debts and liabilities had been paid and satisfied.

The bill was filed on the 19th of July, 1866, and immediately afterwards the Plaintiff moved for an injunction, in terms of the prayer, before Vice-Chancellor *Kindersley*, who refused the motion with costs.

On the occasion of the motion, the Plaintiff was cross-examined in Court, when it appeared that he held only five shares of £20 each in the Credit Foncier, which he acquired solely for the purpose of filing this bill; and that his reason for filing the bill was that he and several of his friends had lost money by speculating in shares of the Credit Foncier, and that he was advised that if he bought shares, and then filed a bill to impeach certain transactions of which he had notice, he would probably be bought off at a high price, and so obtain compensation.

¹ Portions of argument, and of opinions, omitted. - En

Subsequently to the filing of the bill, two extraordinary meetings of the *Credit Foncier* were held on the 30th of July and the 15th of August, 1866, at which resolutions were passed for winding up the company voluntarily, and for the formation of a new company, for objects which would include the carrying on of the business of the *Credit Foncier*.

The Defendants put in answers to the bill, but refused to give full information to the Plaintiff as to the transactions complained of; and their answers were excepted to by the Plaintiff.

The motion now under appeal was made by the Defendants *Grant* and the *Credit Foncier*, and, having been refused by the Vice-Chancellor, was now renewed before the Lords Justices.

The Attorney-General (Sir John Rolt), Mr. Karslake, Q.C., and Mr. Waller, for the company; and

Sir Roundell Palmer, Q.C., Mr. Bailey, Q.C., and Mr. Speed, for the Defendant Grant:—

We say, first, that this suit is not bond fide. The Plaintiff had no shares in the company while the bill was being prepared; he bought five shares just before it was filed, and can give no reason for his proceedings, but that he had lost money by speculating in the shares of the company, and wanted to make the company repay him these losses. The Court will not entertain such a bill: Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company. That case decided that the Plaintiff must have a legitimate interest in the subject matter of the suit. The interest of the Plaintiff is merely nominal. If his whole claim is recovered, and divided among the shareholders, his share would be about 40s. Such a bill is an abuse of the process of the Court, and partakes of the nature of maintenance: Filder v. London, Brighton, and South Coast Railway Company; Foxwell v. Webster.

[Remainder of argument omitted.]

Mr. Wickens, for defendant Seymour.

Mr. Glasse, Q.C., and Mr. Cracknall, for plaintiff, were not called on. [The opinion of Sir G. J. Turner, L. J., is omitted.]

LORD CAIRNS, L. J. This motion is one of a very novel, but of a very important character, because it asks the Court to shut the door in the face of the Plaintiff, not on the merits of the case, but on the ground that he has by his conduct disentitled himself to institute the suit. The theory of the law of this country is, that every subject has a right to bring his complaint to a hearing, if it be not capable of being stopped by a demurrer or a plea. The exceptions which have been established to this rule merely shew the strength of the general rule. Those exceptions are four in number: — First, where the Plaintiff is required to give security for costs. That is hardly an exception, because the Court only stays the proceedings in the suit until the

^{1 9} W. R. 818.

² 1 H. & M. 489.

^{8 12} W. R. 94, 186.

security is given. Second, where the Defendant is willing to give to the Plaintiff all the relief which he asks, and to pay his costs of the suit. Third, where the subject matter of the litigation has perished, or has been removed, and nothing remains to be decided but the payment of costs of the suit. There the Court considers that it would be useless to allow the suit to go on to a hearing when the only question to be determined can be as well decided upon motion. Fourth, where the bill has been filed without the authority of the person who appears as the Plaintiff, or where the name of a corporation has been used without a sufficient title to use it. In such a case the bill is treated as a fraud upon the Court, and is therefore ordered to be taken off the file.

The grounds alleged for the present motion are three: - First, a personal exception to the Plaintiff. I do not think that I unfairly represent the conclusion which the parties desire to draw from the cross-examination of the Plaintiff if I put it in this way. The Plaintiff had in a collateral way lost some money, and he then finds a blot in the management of the company of which he thinks the shareholders might complain. He buys five shares in the company, and then files this bill. in order to induce the company to buy off the litigation. doubt, is a course of conduct which would meet with little approval in this Court, or, indeed, in any other Court, and such conduct might be material at the hearing with reference to the amount of relief which the Plaintiff could obtain, or whether he was entitled to any relief at all. But the question is, whether these facts are necessarily fatal to the Plaintiff's claim to relief? Suppose an answer were put in admitting all the allegations contained in the bill, it would be difficult to sav at this stage of the suit that the Plaintiff's conduct would altogether disentitle him to relief. The case of Forrest v. Manchester, Sheffield, and Lincolnshire Railway, which was relied upon in the argument, is distinguishable from the present case upon two grounds: first, because that was the hearing of the cause; and, secondly (and this is the main distinction), because there the Court came to the conclusion that the Plaintiff was simply a puppet in the hands of another company, and that he was indemnified by that company against the costs of the suit. That objection amounted to this, that a suit professing to be the suit of Company A., was really the suit of Company B.

The second ground relied on in support of this motion was, that the Plaintiff's quantum of interest in the suit was very insignificant. But if we should hold that the suit can be maintained in other respects, I think that the aggregate interest of all the shareholders in the subject matter of the suit is amply sufficient to sustain the suit.

[Remainder of opinion omitted.]

Motion refused with costs.

BURT v. BRITISH, &c. ASSOCIATION.

1859. 4 De Gex & Jones, 158.1

Appeal by plaintiff from the dismissal of his bill by Vice-Chancellor STUART.

Plaintiff sued on behalf of himself and all other shareholders, except those made defendants. The bill sought to set aside various transactions of certain persons with the association.

Greene and Bromehead, for appellant.

Malins, Thring, W. W. Cooper, Bacon, and H. R. Bagshawe, for various defendants.

KNIGHT BRUCE, L. J. [The learned Judge found, upon evidence, that the plaintiff, who had been a director of the association, having had knowledge of the transactions now complained of, had so conducted himself that he must be regarded as having acquiesced in and confirmed these transactions. The opinion then proceeds as follows:]

I am of opinion, however, looking only at what took place in *December*, 1856, that by the conduct of the Plaintiff at that time, and his conduct afterwards, he has precluded himself from any right of complaint, whatever right of complaint others may have, either as against the Defendants or as against the Plaintiff himself.

As to that it is not necessary to give an opinion. He has sued on behalf of himself and others, and notwithstanding what has been contended on the part of the Defendants, I assume that there still exist persons who have a right to complain of these transactions. But that will not give the Plaintiff a title to sue for them. As on one hand a Plaintiff, who has a right to complain of an act done to a numerous society of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested though no other may wish to sue, so, although there are a hundred who wish to institute a suit and are entitled to sue, still if they sue by a Plaintiff only, who has personally precluded himself from suing, that suit cannot proceed. The present case in my opinion stands upon the same footing as if the dissatisfied shareholders (supposing them to be dissatisfied) had sued by a Plaintiff who had released the Defendants. For that in my opinion is the position in which effectually Mr. Burt has placed himself.

Whether, therefore, agreeing or disagreeing with the particular ground on which his Honor the Vice-Chancellor has proceeded, I apprehend that the grounds which I have stated are amply sufficient to render a dismissal of the bill necessary.

TURNER, L. J., concurred.

¹ Statement abridged. Only so much of opinion is given as relates to one point - Ep.

WINSOR v. BAILEY.

1875. 55 New Hampshire, 218 1

Bill in equity by Winsor et als. against the Hooksett M'f'g Co. and various individuals; alleging that certain monies of the company have been wrongfully paid over to some of the defendants; and praving that the recipients may be decreed to repay the same to the corporation. The bill alleges that the plaintiffs are owners of stock in the company, and sets out specifically the number of shares owned by each; but does not allege that they were owners of stock at the time of the payments complained of. Defendants demurred.

Mugridge, for plaintiffs.

Fowler and Tappan, for defendants.

LADD, J.

2. The bill alleges that the plaintiffs are owners of stock, and sets out specifically the amount owned by each. It is contended for the defendants that the bill is defective in not showing that they were owners of stock at the time of the alleged wrongful payment to some or all of the defendants. No authority is referred to in support of this position, and I see no sound reason upon which it can be sustained. To hold so, would seem to involve the singular consequence that the transfer of stock in a corporation extinguishes the right to inquire into the previous fraudulent conduct of its officers, whereby its funds have been misappropriated.

Cushing, C. J., concurred.

SMITH, J. 2. The plaintiffs allege that they are stockholders in the

Hooksett Manufacturing Company, and specify the number of shares owned by each, but do not allege that they were stockholders at the time the dividend was paid the defendants. But that is not necessary, and it is immaterial whether they were or not. The transfer of the stock conveved to them not only the ownership of the shares and the right to the future dividends thereon, but also placed them on an equal footing with the other stockholders in respect to the right to call the officers and agents of the corporation to an account for their fraudulent conduct.

¹ Only so much of the case is given as relates to one point. — Ep.

PARSONS v. JOSEPH.

1890. 92 Alabama, 403.1

Appeal from the Chancery Court of Jefferson. Heard before the Hon. Thomas Cobbs.

The bill in this case was filed on the 19th day of July, 1890, by Henry Joseph, as a stockholder in the Birmingham, Powderly & Bessemer Street Railroad Company, against the said corporation and J. H. Parsons; and sought the cancellation of certain certificates of stock issued by the corporation to said Parsons, on the ground that the stock was fictitious and fraudulent. There was a demurrer to the bill, and a motion to dissolve the injunction, each of which was overruled; and this appeal is sued out by the defendants from that interlocutory decree.

Lea & Greene, for appellants. White & Howze, contra.

COLEMAN, J. The purpose of the bill is to have certain certificates of stock issued by the Birmingham, Powderly & Bessemer Street Railroad Co. to defendant Parsons, cancelled, on the ground that the stock is fictitious, and was issued in violation of the Constitution and statute law of the State. The bill prayed an injunction, and the writ was awarded by the chancellor. A demurrer was interposed, and also an answer by the defendant Parsons. The cause was submitted for decree on the demurrer, and upon motion to dissolve the injunction. The court overruled the demurrer, and denied the motion to dissolve the injunction, and from this interlocutory decree the appeal is taken.

Among other averments, the bill substantially alleges that plaintiff is a bona fide stockholder in said company; that shortly after the organization of the company, the defendant subscribed for one hundred and seven shares of the capital stock of the company, of the par value of fifty dollars each, and paid for the same in full by conveying to the company thirty-nine acres of land (describing the land) at an agreed, price and valuation of one hundred and thirty-seven dollars per acre, when the land was not worth more than twenty-five dollars per acre, and for this land Parsons was to receive one hundred and seven shares of the stock; that shortly thereafter, the capital stock of the company was doubled, and without further consideration than the thirty-nine acres of land, Parsons' stock was doubled, and he received two hundred and fourteen shares of the capital stock. The bill, as amended, charges the excessive valuation of the land was made knowingly, wilfully, and with the fraudulent intent of having issued to Parsons the fictitious stock, in violation of law. This is a sufficient statement of the facts for the consideration of the demurrer.

Arguments omitted. — ED.

The demurrer admits the truth of the averments. It is contended, that the bill is defective in not averring that plaintiff was a stockholder at the time of the transaction, complained of as being fraudulent, or that his stock devolved upon him by operation of law.

In the case of Dimpfell v. Ohio & Miss. R. R. Co., 110 U.S. p. 209, relied upon by appellant, it was held, that a stockholder, contesting as ultra vires an act of the directors, should aver "that he was a stockholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law." To the same effect was Hawes v. Oakland, 104 U.S. 450; and many others might be cited. Upon an examination of these authorities, it will be seen that the principle asserted rests solely upon equity Rule No. 94 adopted by the United States Supreme Court and which may be found in the preface to vol. 104 of U.S. Reports. Morawetz on Private Corporations, speaking of this rule, says, it was evidently designed as a rule of practice merely, and was deemed necessary to guard courts from being imposed upon by collusion of parties. - Morawetz on Priv. Corp., §§ 269, 270. The rule is not a general principle of law, applicable to pleadings in all the courts, and has never been applied to the courts of this State. The demurrer to the bill for failing to make this averment was properly overruled.

The motion to dissolve the injunction was heard upon the sworn bill and answer. The answer denied that plaintiff was a bona fide stockholder, and set up that plaintiff was the transferee of one E. Lesser. The answer admits that defendant's stock was doubled without the payment of any additional consideration than that of the land; but by way of explanation and defense, avers that the lands were not truly and properly valued at first, and the increased valuation of the lands only raised them to their real and true value, and the additional issue of stock was for property at its fair valuation. The answer continues, however, as follows: that if said transaction had been illegal and fraudulent, and not done in good faith, complainant is estopped from setting up fraud in said transaction, or seeking to cancel said stock, because E. Lesser, who was complainant's transferrer, participated in all of said transactions and himself fixed the value of said lands, with full knowledge of and after full investigation of the value of said land.

A transferree of stock is not necessarily disqualified as a suitor in all cases, because the prior holders were personally disqualified. If the transferee purchased the shares in good faith, and without notice of the fact that the prior holder had precluded himself from suing, he would have as just a title to relief, as if he had purchased from a share-holder who was under no disability; but, if the purchaser was aware that the prior holder had barred his right to relief, neither justice nor public policy would require that the transferee, under these circumstances, should be accorded any greater rights than his transferrer.—Morawetz, supra, § 267.

The same rule prevails in this State in favor of derivative purchasers.

If a claimant was a bona fide purchaser, without notice of a fraud, or of facts which the law considers sufficient to establish it, or from which it is inferable, then he could not be affected by notice to his vendor. — Horton v. Smith, 8 Ala. 78; Fenno v. Sayre, 3 Ala. 458; Weer v. Davis, 4 Ala. 442; Martinez v. Lindsey, 91 Ala. 334; Wait on Insol. Cor., §§ 628, 630.

If a stockholder participates in a wrongful or fraudulent contract, or silently acquiesces until the contract becomes executed, he can not then come into a court of equity, to cancel the contract, and more especially, if the company, or himself, as a stockholder, has reaped a benefit from the contract; and this rule holds good, although the consideration of the contract may be one expressly prohibited by statute. The same disability would attach to the transferee of his stock who bought with notice. We consider this general rule of equity abundantly sustained. - Morawetz on Priv. Corp., §§ 261, 262; Cook on Stock and Stockholders, §§ 39, 40, 735; Wright v. Hughes, 12 Amer. St. Rep. 413. It is sustained by the familiar rule, that he who invokes the aid of a court of equity must have clean hands. Mr. Cook states the conditions upon which a stockholder can sustain a suit to remedy the frauds, ultra vires acts or negligence of directors, to be, first, the acts complained of must be such as to amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone; second, that the complaining stockholder himself is free from laches, acquiescence of the acts to remedy which the suit is brought; third, that the corporation has been requested and refused or neglected to institute the suit, that the suit is instituted by bona fide stockholders as complainants, and that the corporation and the guilty parties, and other proper parties have been made defendants. Cook. supra, § 646.

If the averments of the bill are sustained by proof, the stock issued to the defendants was in violation of section 1662 of the Code and of section 6, Article XIV of the Constitution. On the contrary, if the proof shows that the property was received in payment of stock, at a fair valuation, such would not be the result. — Davis Bros. v. Montgomery Fur. & Chem. Co., at present term.

In cases where the stockholders of the company by any lackes, acquiescence, or participation in the unlawful and fictitious issue of stock or for any other sufficient cause are precluded from instituting the proper proceedings, to remedy the wrong, the remedy is still open to the State to institute all necessary and proper proceedings to vacate and dissolve the corporation, or have such other proper judgment and decree rendered, as the proof and justice may demand.

It may be, that stockholders, who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation, are liable as stockholders who have not paid up in full for their stock, within the meaning of the statute, to creditors who have not precluded themselves from maintaining the suit. — Wait, supra, § 593; Douglas v. Ireland, 73 N. Y. 100; Boynton v. Andrews, 63 N. Y. 93.

Applying the rule of law applicable when a motion to dissolve an injunction is submitted upon bill, exhibits, and answer, and considering only so much of the answer as is responsive to the bill, we are of opinion that the decretal order, overruling the demurrers and motion to dissolve the injunction, is free from error.

Affirmed.

The case of *Downey v. Joseph* was affirmed on the authority of the above case.

In re AMBROSE LAKE TIN AND COPPER MINING CO.

Ex parte TAYLOR. Ex parte MOSS.

1880. Law Reports, 14 Chancery Division, 390.

This was an appeal from a decision of Mr. Fisher, the Vice-Warden of the Stannaries Court, in the winding-up of the Ambrose Lake Tin and Copper Mining Company, Limited, given on the 2d of July, 1879.

In the course of the years 1870 and 1871 the appellants, Joseph Taylor and Joshua Moss, became the principal proprietors of the Ambrose Lake mine, which at that time was carried on as a cost-book company divided into 6000 shares. The concern was not prosperous, and it was determined by the shareholders to work the mine as a limited company. For that purpose the mine and machinery were assigned by the lessees to W. Eaton, a clerk of Taylor's; and by a memorandum of agreement dated the 22d of December, 1871, made between W. Eaton of the one part, and Joseph Taylor and E. Hardey of the other part, Eaton agreed to sell the mine and machinery to Taylor and Hardey in trust for a company to be called the Ambrose Lake Tin and Copper Mining Company, Limited, in consideration of the sum of £24,000, to be paid to Eaton in manner following, that is to say, 6000 fully paid-up shares of £2 each, and 12,000 shares with 20s. each considered as paid thereon.

This agreement was registered under the Companies Act, 1867, on the 26th of January, 1872.

The new company was registered on the 19th of January, 1872. The memorandum of association stated that the object of the company was to purchase and work the Ambrose Lake mine, and that the capital of the company was to be £36,000, divided into 18,000 shares of £2 each.

By the articles of association the first directors were to be Joshua Moss, Joseph Taylor, E. Hardey, William Moss, and J. Maguire, all of whom had shares in the cost-book mine, and Taylor was appointed managing director. The memorandum and articles referred to the agreement which had been entered into with Eaton for the purchase of the mine.

At the first meeting of the directors it was resolved that the agreement should be adopted, and Eaton was credited with £24,000, namely, £12,000 on account of 6000 fully paid-up shares, and £12,000 on account of 12,000 shares with £1 paid on each. But in fact only five shares were allotted to Eaton; 2900 fully paid-up shares, and 5650 shares with £1 paid up were allotted to J. Moss; 2880 fully paid-up shares and 5650 shares with £1 paid up were allotted to J. Taylor; and the rest of the shares were divided between the other shareholders in the cost-book mine according to their interest therein.

The value of the mine and machinery was considered by the Vice-Warden to have been about £6000.

Taylor sold a considerable number of his shares at a premium. Moss retained all his except 150.

No prospectus was issued to the public. The allottees paid up the remainder of the money due on the shares on which £1 only had been paid; but the company was not successful, and was wound up by an order of the Court on the 8th of January, 1878.

The official liquidator applied for orders against Moss and Taylor, charging them with having improperly sold the mine to the company for more than it was worth, and calling upon them to repay the difference between the value of their shares in the new company, including the profit on those which had been sold, and the value of their interests in the cost-book mine. The Vice-Warden took this view of the liability of the two appellants, and in the result he ordered Moss to pay the sum of £6825, and Taylor the sum of £10,185.

From this order Moss and Taylor appealed,

Cookson, Q. C., and Burton Buckley, for the appellant Moss; and Waller, Q. C., and Bunting, for the appellant Taylor.

[Argument omitted.]

Ince, Q. C., and Northmore Lawrence, for the official liquidator.

The contract was a misrepresentation from beginning to end. Eaton was not in possession of the mine and had no title to it. Moss and Taylor had constituted themselves trustees for the new company, and were buying the property from themselves for the company, and they bought it at a far higher price than it was worth. transaction cannot stand. It makes no difference of whom the company consisted at the time. It must be treated as having an independent existence, and those who now represent it have a right to call on the directors and all persons who stand in a fiduciary relation to it to account for their profits. Moss and Taylor made a profit by the transaction, for they received shares to the value of more than £22,000 in exchange for property which was worth only £6000. But if they made no profit themselves they prevented the company from making profit, by taking shares which the company might have allotted to the public. We are, therefore, entitled to call on them to make good what they have deprived us of, and that is measured by the value which might have been obtained by their shares in the market.

[Citations omitted.]

James, L. J. I am of opinion that the order of the Vice-Warden in this case cannot be sustained. It appears to me that one must look, even as between companies and directors, at what the substance of the transaction was as between the company and the persons whom the company is seeking to make answerable. Now the transaction appears to me to be quite clear, and I cannot help thinking myself there was an object in it, and that object was not at all an object for obtaining an undue advantage as between the company and the persons who are dealing with the company and selling to the company, but the obtaining an undue advantage in the stock market, wherever the stock market of the company might be, as between the persons who got the shares in the new company and the persons who were foolish enough to buy the shares from them in the new company. They intended to represent the thing as worth something a great deal more than it was worth, namely, the nominal capital that was attributed to it.

Now what we have got here to consider is a sale in substance made by the vendors for themselves, as beneficially interested, to themselves as directors of the company, being in that sense in a fiduciary character towards the company, and the sale is a sale by themselves in the one character to themselves in the other character. Of course such a sale is a thing that cannot stand, if it is questioned in time, and proper offers made to restore the thing purchased. And if there is any difficulty in the way of restoration, if it is made out that they had received something beyond the proper price of the property, there ought to be no difficulty in making them pay that extra value. Suppose the property had been sold before the fraud was discovered, or suppose the cestuis que trust laid out a great deal of money in improve ments, then the only mode of setting it right would be to make the vendors give the extra price which was paid for it. According to my view of this case the vendors did get no extra price from the company as a company. What the company got was the mine as it stood. The mine and machinery and plant, or whatever was on the property, was sold to them. Now what they gave for it was a certain share in the mine, the very property itself divided into a great number of shares, it was a certain share in the assets of the company; the assets of the company consisting only of the very thing which they had bought. No doubt they got the assets of the company at that moment. which consisted of their right to call up the unpaid part of the unpaid shares. But then the right to call up that was a liability upon the vendors themselves, so that the only thing which the company gave back to the vendors was what the vendors had given to them, and what they covenanted to give to them, that is to say, the property and the liability to contribute the money which was due on the shares.

Under these circumstances it seems to me impossible to say that, however wrong the transaction was in respect to other persons, there was anything wrong as between the company and the vendors. There was no fraud on the existing shareholders, because they were parties to it. There was no fraud on any future allottees of shares, because there could be, under the circumstances at the time the arrangement was made and completed, no future allottees of shares. The transaction was a transaction in which the whole of the capital of the company was given in exchange for the property purchased.

That being so, it seems to me that the numerous other questions which have arisen in this matter, and which have been discussed at some length and with considerable ability, do not arise. In my view, the company only gave back in substance that which it was getting, and the fraud was not between the vendors and the company, the purchasers, but was a thing calculated to delude people into believing that the shares when got were something more valuable than they really were. What the company lost, if they lost anything, was this: If they had formed the company and issued shares, they might have got the fictitious value which the shares would have brought in the market by availing themselves of the lies respecting the property, which they say are contained in the contract. That does not seem to me to be a sort of thing which the company would be entitled to claim. I rest my decision on the ground which was opened by the appellants' counsel, particularly by Mr. Buckley, that what was taken back was the very thing that was given in exchange for it, calling it by different names and dividing it into differenteshares.

Brett, L. J. Whether a fraud upon which any action can be taken has been committed in this case I am not prepared at present to say, but that a fraud was intended I have not the least doubt. The transaction has all the badges of fraud, but I think that the claim which is now made fails altogether; because, even if the right parties are suing, they have not asked for the right remedy; and I also think the parties suing are not the parties who were intended to be defrauded on this occasion.

Now, it seems to me the facts are these, that certain persons were the owners of the mine, and they had worked it for a certain time, and they knew it was a perfect failure; that they then, in order to retrieve that failure, pretended themselves to make this arrangement, that as to that mine, which was a failing mine, probably worth nothing, they might pretend to buy the mine from a person other than themselves, although they were really (if it can be called a purchase at all) buying it from themselves for £24,000, but that they might then risk a further sum of £12,000, making up £36,000, so as to work the mine for a certain time, and then the mine appearing to have been bought for £24,000, and £12,000 being advanced by them to work it, it would appear to the outside public to be a profitable mine, and then the shares might be sold at a profit, and so, instead of having a failing mine in which they were wasting their capital, by risking £12,000 more they would be able to place shares with the public, retrieve what they lost, leaving the public to lose what they gave for the mine.

Now, many questions have been raised as to what would have been the effect if this had been done by directors of an existing company. It seems to me, the whole transaction was a solemn farce. This agreement which has been set out is a mere farce. These people were not acting as trustees for anybody, they were the people themselves, and that which is called a contract for purchase and sale being made by these people with themselves is no contract at all, or anything of the kind. Therefore, this agreement, which is set out, and pretends to represent an agreement of purchase and sale, is a mere falsehood. It is not a contract of purchase and sale, to my mind, for a price greater than they ought to have given, or a contract of purchase and sale for a certain price, if the supposed price is given back to the agent for the people complaining. The truth is, it is no contract at all, and this agreement which is set out is a mere farce. Therefore, the very constitution of the company, this turning of themselves by this mode into a limited company, is a mere representation. Whether the registration could have been set aside or not I really do not know, but the whole thing is a misrepresentation — to defraud whom? The people who were representing this farce did not deceive themselves; nor were the people supposed to be buying nor the people supposed to be selling deceived. Is there any deception at all? The whole thing was done by the same people. There was nobody in the limits of company who was deceived in the least. It is impossible, in my mind, to suppose that it had no business purpose, and that it was not intended to produce some effect. On whom could it produce that effect? It could not produce that effect on the parties themselves. It is quite true to say, inasmuch as they were the same people, they gave nothing for this mine and received nothing for this mine. The supposed purchaser gave nothing, the supposed seller received nothing, and the only people who would be deceived would be the outside public; but how would they be deceived? If anybody who had shares in the new company has sold those shares to anybody of the outside public upon the faith of those documents which are contained in these articles of association, or memorandum, — if they have sold their shares on the faith of that simulated agreement for the purchase of the mine being a true one, it seems to me they have obtained the money from those purchasers by fraud.

To show that, it must be shown that a vendor of shares in the company did sell to the purchasers shares in the company, and that the persons who bought the shares purchased them on the faith of this agreement, and the representations made in it. If that should ever be proved, that would give a remedy to any person who has so been deceived against the person who made these representations to him, that is, against the individual. There would be no liability on the part of the company as such. Therefore, there has been no mischief done to the company as the company, and it seems to me, therefore, the latter has no remedy at all. However improper or disreputable,

as my Lord says, this transaction was, it did no mischief to anybody whom the liquidator represents, and it could only do mischief to people who may have been deceived, but we cannot tell now whether anybody has been deceived. Those persons are not before the Court. Therefore the remedy sought here is by the wrong persons and in the wrong form.

COTTON, L. J. . . . As I understand the transaction, it was this: They were the owners of the mine, the only owners, and they were originally the only members of the company. I say that because, although shares were allotted to some persons, yet as far as I can see they were simply nominees of some of the owners of the mine, and therefore were exactly in the same position as the owners of the mine. Then they, being entitled to the mine in certain proportions, which I will consider as so many £2 shares, in handing over the property of the company, represent their interest by a different denomination. For themselves having all the shares in the company, they choose to call their shares in the mine, as the property of the company, not 6000 shares of £2 each, but 18,000 shares of £2 each; of course each of those 18,000 shares is much less valuable than its nominal value. But they are the only members of the company, and they were the only owners of the mine. Therefore, I cannot see how the company can complain of that act which all the members of the company were cognizant of, and which, as far as they could, they approved of and

If that is so, the whole case comes to an end. It may be that what was done was done for the purpose of enabling the company to be passed off on the market as something different from what it was. Whether that was so or not is, in my opinion, immaterial to the present question. But if it was so, the remedy is not an action by the company against those who were vendors and purchasers. The remedy is a remedy of each purchaser of shares, if there were any such, who was deceived by the representations made by his vendor as to the constitution of the company,

In my opinion, not only can this order not be maintained, but even if there has been any profit made by the appellants, we are not in a position at the suit and instance of the company in any way to make them account for it.

PARSONS v. HAYES.

1883. 14 Abbott's New Cases (N. Y.), 419.1

PLAINTIFF sues on behalf of himself and all other shareholders in the Varhuff Mining, &c. Co., a corporation formed under the laws of New York. The defendants are the corporation, and various individuals who are officers of the same. The complaint alleged, *inter alia*, that the corporation was under a disability to sue, by reason of being controlled by its directors, who were guilty of malfeasance in office. The other averments are stated in the opinion.

The original complaint was demurred to. The demurrer was overruled, but plaintiff amended the complaint. Defendants answered. Plaintiff demurred to certain matters set up as defenses. Certain of plaintiff's demurrers were overruled, and others were sustained. Plaintiff appealed to the General Term of the Superior Court, from the order overruling his demurrers to certain defenses set out in the answer.

Grove M. Harwood and John B. O'Donnell, for appellant.

[Omitting part of argument.]

III. The corporation could sue, as it is a distinct person from its shareholders (Pollock on Contr., 81, 82; Lindley on Partn. 4, 5; Dicey on Parties, 163). The members are but agents of the corporation and the corporation may sue its members (*Society* v. *Abbott*, 2 Beav. 559).

IV. The corporation holds the property and assets as a trustee for the members (*Hotel Co. v. Wade*, 97 U. S. 13), and if the corporation will not sue, the members can (*Butts v. Wood*, 37 N. Y. 317; *Greaves* v. *Gouge*, 69 N. Y. 154).

Robert L. Fowler and Victor Morawetz, for various defendants.

[Omitting part of argument.]

II. This is not an action for a wrong to the plaintiff. If the defendants had deceived the plaintiff, or caused him any injury directly, he would be entitled to recover the amount of damages he had suffered in an action of a legal nature. No such claim is made. The complaint is framed as a proceeding on behalf of the corporation for a wrong against the corporation. Plaintiff alleges that the stock which he purchased was issued as paid up stock, and represented to the world as paid up stock by the board of directors. But he does not state that he was deceived by this representation, or that it caused him any injury. The form of the complaint is that of the ordinary stockholders' bill known in chancery practice. It is fundamental that a suit of this character cannot be maintained by a stockholder, unless

¹ The case, as here given, is made up partly from the report in 14 Abbott, and partly from the report in 50 New York Superior Court, 29. The statement is rewritten, and portions of the argument are omitted.—Ed.

the corporation itself would be entitled to recover in an action for the wrongs complained of. The complaint does not show that the corporation ever had a cause of action against the individual defendants. It was deprived of nothing of value by the issue of its shares. Shares of stock are merely the proportionate interests of the holders in the whole corporate concern, and their value depends upon the real capital which the company owns. The whole and the sum of its parts must be equal. In the present case the purchaser took back what he gave in another form. The corporation was not really in existence until the shares had been issued, although the statute provides that it shall be deemed in existence for certain purposes from the filing of the certificate of incorporation. The existence of a corporation before its shares have been issued is a fiction. The corporation could not be injured by the act which brought it into being.

IV. If a subsequent bona fide purchaser was deceived by the unauthorized and untrue certificates issued by the directors, he would have his remedy for damages. Creditors also would be entitled to redress to the extent of their claims. But the corporation as a body could not complain.

V. The law recognizes the fact that a corporation and the whole number of its stockholders are identical, - that the one represents and is made up of the other. It is upon this ground alone that the plaintiff has any standing in this court. A corporation cannot complain even on account of a breach of trust, or a direct misapplication of the corporate funds by the directors, after the acts complained of have been acquiesced in and ratified by the whole body of shareholders. If the corporation itself cannot complain under these circumstances, it is plain that a stockholder cannot complain on its behalf (Hotel Co. v. Wade, 97 U. S. 13; Kent v. Quicksilver Mining Co., 78 N. Y. 159, 184; Scott v. Depeyster, 1 Edw. Ch. 513, 536; Watt's Appeal, 78 Pa. St. 370; Terry v. Eagle Lock Co., 47 Conn. 141; Ritchen v. St. Louis, &c. Ry. Co., 69 Mo. 224, 264; Samuel v. Holladay, 1 Woolw. 400; Zabriskie v. Hackensack, &c. R. R. Co., 18 N.J. Eq. 178, 194; Phosphate of Lime Co. v. Green, L. R., 7 C. P. 43; Ffooks v. Southwestern Ry. Co., 1 Sm. & G. 142, 164; Graham v. Birkenhead, &c. Ry. Co., 2 McM. & G. 146).

VII. There is a distinction between a suit by a shareholder for relief on account of a wrong committed before he purchased his shares, and a suit brought to restrain the performance of an unauthorized and void contract, which had been previously entered into.

SEDGWICK C. J. [After deciding that, upon this appeal, it is proper to examine the complaint to see if it contains any cause of action.] The learned counsel for the appellant states the claim of the complaint as follows. The plaintiff sues on behalf of himself and all other stockholders of the corporation defendant, alleging that the individual

defendants, then being trustees of the said corporation, immediately after the organization thereof, by agreement with one Catlow, issued to him the whole capital stock of said corporation, viz. \$2,000,000, in exchange for property worth not to exceed \$150,000. That 90,000 shares of the stock were turned over to the defendant Hayes and his associates, and 20,000 shares to the defendant corporation by said Catlow, without payment therefor, in pursuance of the real agreement between the parties for the purchase of property and the issue of stock. That the individual defendants knew, or could have known, the value of the property, and that a portion of the stock was to be turned over as stated. That the defendants, trustees, represented the stock as full paid, and that the stock has been sold as full paid to innocent purchasers, including the plaintiff. That the plaintiff purchased his stock regularly in the open market, relying upon such representations, and received regular certificates, and that the stock was regularly transferred to him on the books of the corporation. That the individual defendants have received large gains and profits from the sale of that portion of the stock turned over to them. That the individual defendants have sold the stock turned over to the defendant corporation, or a large portion of it, at \$1 per share. That the individual defendants have not accounted for the difference between the value of the stock and the amount of property received (except as to the \$1 a share received from the treasury stock), nor for the gains and profits received by them from the sale of the stock turned over to them. That the corporation defendant is still under the control of the individual

The defendants among other defenses pleaded that plaintiff purchased his stock, knowing the facts attending the transaction set out in the complaint.

By the terms of the complaint the plaintiff sues for himself and "all other stockholders of the defendant company who may choose to come in and avail themselves of the benefit of the actions." The plaintiff is excused from naming all of these stockholders, on account of the inconvenience of making a great number of persons parties; but in legal contemplation, all of them are parties plaintiff, and all of them are in like case with the plaintiff named. These persons are stockholders, as it is called, having become so by transfer of shares from Catlow remotely or directly, and Catlow himself, if he have not transferred all his stock; unless as to Catlow, he is not to be deemed a party because he is not in like case with the plaintiff.

It will be convenient first to inquire, if Catlow as a plaintiff could have maintained such an action. The facts would have been, that previous to the impeached issue of certificates of shares, the corporation would have been in existence by virtue of the statute which declares (*Laws* 1848 c. 40, § 2, 3 *Edm.* 733) that when the certificate shall have been filed, the persons who shall have signed and acknowledged the same and their successors shall be a body politic and corporate in fact

and in name, by the name stated in such certificate and by that name have succession and shall be capable of suing and being sued and they and their successors may have a common seal and they shall by their corporate name, be capable in law of purchasing, etc., property.

There was no stock or capital and there could be none excepting by third persons paying money or property for certificates of shares of the capital issued to them. There were then, of course, no shareholders. Catlow and the trustees of the corporation, who, by the statute were the corporation, made an agreement that was carried out, that certificates should be issued to him by the trustees which should represent that he was the owner of the whole number of shares of the capital stock, or two hundred thousand shares of the stock which by the certificate of incorporation was to be \$2,000,000, and he should convey to the company mining claims and property, which in fact had no greater value than \$150,000, as the parties to the transaction knew. In substance Catlow subscribed for the whole of the shares, agreeing to pay therefor, only property of the value named.

The statute declared that only money should be taken by the trustees to the nominal amount of the shares issued, or property, the actual value of which was equal, to that nominal amount. The agreement was unlawful and its execution could not have been enforced by either party to it. It was in fact made and executed to evade the statute.

It was a part of the agreement that upon the certificates being issued to Catlow he should transfer to each of the trustees certain shares. The trustees received these shares from Catlow and afterwards sold them for large sums of money for their own benefit. Upon the certificates being issued to Catlow he would become a shareholder. At least it is necessary to suppose, that although the transaction was forbidden by law, yet it was in fact done, and by it, Catlow became a shareholder. Upon the supposition that Catlow, being the owner of all the shares excepting such as he had transferred to the trustees, brought his action, he would claim that he had a right to demand that the company should bring an action against the trustees to compel them to pay the company money sufficient with the value of the mining property to amount to \$2,000,000 which was by the certificate to be the capital, and also pay to the company the amounts of money for which they had sold the shares he had transferred to them.

As the action would be by him declared to be for his benefit, it would ordinarily be necessary to say no more, than that he was not entitled to be benefited, through claiming an interest in what may be called damages for an act in which he had taken part, indeed which he had promoted. But certain positions have been taken for the present plaintiff, which would apply to Catlow and those may be now examined.

It is said for the present plaintiff that the transaction was unlawful and invalid, and cannot be made lawful or be validated. If that be so, it would be true in the case of Catlow. It is nevertheless also true,

that there is nothing unlawful or invalid, in the parties to an unlawful arrangement, being without a right to share in damages (to use a convenient word) which have flowed from the unlawful act.

There is at this point a distinction taken for the plaintiff, between the right of the corporation to damages and the right of a party consenting to the wrong, being entitled to damages. It is said that a corporation is an artificial person, a legal entity entirely different and distinct from the persons of which it is composed and the corporation as a distinct person may be injured by one or all of its members, and in either case has a right of action. Without stopping to ascertain the real meaning of this definition of a corporation, and assuming the other proposition to be correct, it is further to be ascertained if the corporation has been injured in the transaction or has suffered damage.

The injury or damage in one direction would be the consequence of issuing certificates by an invalid act that on the assumption of the plaintiff's argument is incapable of ratification. If this be a void act, then it would be necessary to say, that the certificates issued were void and the corporation could proceed to issue certificates of shares in a legal manner. But such a view would disclose that Catlow or the plaintiff would not be a shareholder and therefore not entitled to bring such an action as the present.

Such an injury, of course, is not claimed, but it is claimed that the injury was the trustees issuing for property of small value certificates to the nominal amount of \$2,000,000, whereas it was the duty of the trustees not to issue them except for \$2,000,000. The complaint does not allege nor can it be presumed that if the certificates had been properly dealt with, any more could have been procured for them, than was in fact, and therefore it does not appear that any pecuniary damage was suffered. Or, in other words, it does not appear that if the trustees had performed their duty, of not issuing except for equivalent value, that the corporation would have had more capital than now.)

Excepting these considerations it may be supposed that there was damage to the company from the trustees' acts. Was there any injury under the facts? It is true, that the corporation is something more than its trustees and shareholders; but its property, chattels, money or choses in action, it owns not in its own interest but for the pecuniary benefit of the natural persons connected with it. It would be impossible to look upon the property rights of a corporation merely having regard to its being an ideal creature. It acts through natural persons. acts for the benefit of natural persons. In truth natural persons compose it. The statute under which it was formed says this. trustees who are trustees under the statute for the corporation are the trustees for the shareholders. In Karnes v. Rochester & Genesee Valley R. R. (4 Abb. Pr. N. S. 107), the court said, "The directors stand in the relation of trustees to stockholders and between them exists the relation of trustee and cestui que trust." As for this Butts v. Wood (38 B. 181, afterwards affirmed, 37 N. Y. 317), was quoted,

it must have been said upon an identification of the stockholders and the corporation. The same case said (p. 110), "The corporation does not stand in any fiduciary relation to its stockholders. Such a relation between the corporation and its corporators, is shown in a well considered opinion by Vice-Chancellor McCoun, in Verplanck v. Mercantile Ins. Co. (1 Edw. Ch. 87), to be impossible. The stockholders are in no sense creditors of the corporation, nor are they in the situation of partners. They are constituent parts of the corporation." The language of Vice-Chancellor McCoun, in Verplanck v. Mercantile Ins. Co. (1 Edw. Ch. 87) was, "The corporation is merely the creature of the law, a political body, not a natural body, made up of the compact entered into by the stockholders, each of whom becomes a corporator identified with and forming a constituent part of the corporate body, and therefore when we speak of stockholders and the incorporated company of which they are the components, we refer to one and the same collection of persons. How then, can the relation of trustees and cestui que trust exist, for such a relation requires separate and distinct persons or separate and distinct bodies to constitute it." This case afterwards affirms that the directors are the agents and trustees of the corporation or stockholders.

In Railway Company v. Allenton (18 Wall. 234), the charter declared that all the corporate powers of the corporations shall be vested in and exercised by a board of directors, etc., and it also declared that the capital stock of the corporation may be increased from time to time at the pleasure of said corporation. The court held that the capital could not be increased by the directors without the consent of the shareholders. The opinion said that a corporation like a partnership is an association of natural persons, and that fundamental changes of corporate purposes cannot be made without the express or implied consent of the members.

Again, considering that the fundamental position, is that Catlow became in fact, shareholder to the amount of all the capital stock, the following was the relation between the parties. The corporation was the holder of the legal title of the property of the corporation, subject to corporate uses. Excepting this legal title for corporate uses, the shareholders were the parties interested in the property in fact, owning all of it, excepting the legal title, which as against them could be used for corporate purposes. The trustees were the statutory corporation. The shareholders were members or a part of the corporation. The corporation held the legal title, for the pecuniary benefit of the shareholders, having no beneficial or pecuniary benefit in it.

On the claim for the plaintiff, the thing possessed is the right of the corporation to have an action against its trustees, for damages for their acts which it is claimed were wrongful to the corporation. This right was, if it existed, held by the same tenure and for the same purposes that other property would be held. The corporation would have a bare title to it for the beneficial use of shareholders. It seems to be evident,

that the corporation could not claim as damage to its interest what would be damage to the beneficial interest where the owners of the latter had consented to the so called injury.

In fact, however, the case is a little different in point of circumstance, although not essentially. The beneficial owner or shareholder having in advance of the occurrence, which but for their participation would have created a cause of action in the corporation, promoted it and then participated in it, the conduct of the trustees never made a cause of action, because that conduct was not wrongful as respects the shareholder.

The principles that have now been used are established by Scott v. De Peyster (1 Edw. Ch. 513); Hotel Co. v. Wade (97 U. S. 13); Kent v. Quicksilver Mining Co. (78 N. Y. 159). It is not necessary to give the reasoning of these cases. They are applicable here. It is supposed that in the last case there is a difference, in that acquiescence of shareholders was held to estop them in favor of innocent third parties. But it must be considered that after the power to ratify or acquiesce is held to exist, the same principle would act in favor of third parties although not innocent, against whom damages for the act ratified were claimed.

It seems to be clear that Catlow could not maintain an action like this, first because he could not claim that the corporation should bring an action for his benefit on account of a transaction which he took part in, and second because the corporation would have no cause of action or right to damages.

If the second proposition be true, then it necessarily follows there never having been any cause of action, or the right to damages having never accrued the claim cannot be revived in the future in favor of any person whether or not a transferee of shares from Catlow.

The plaintiff, however, because he claims through a transfer from Catlow cannot bring an action which Catlow could not have brought upon this case.

In Mann v. Currie (2:B. 298), the court said of the defendant that "if he became a stockholder by transfer to him of the stock of an original subscriber, he at once adopted his contract with the company and became substituted in his place, both as regards his rights and liabilities." This was said in relation to the obligations of the defendant to fulfil the terms of the original subscription of his assignor. The reasoning that tends to the application of this conclusion in this case is just and seems to be clear. The shares which the plaintiff holds came to him through a certificate which was issued upon a particular arrangement under which the plaintiff claims, necessarily admitting it to have been effective. One feature of that arrangement was that the certificate should be issued to Catlow as his property for a consideration which the plaintiff claims was injurious to the corporation. As the plaintiff claims that the consideration although unlawful was sufficient to give a title which he maintains, he must abide by it as a fact and

therefore in all its consequences. It is not competent for him to take part and reject part as it was one transaction. Counsel for the defendant in a later case before the general term cited on this point: Hooker v. London Railway Co. (7 Ins. 368); the opinions in Williams v. Telegraph Co. (48 Super. Ct. 349); Mech. Bank v. N. Y. & N. H. R. R. Co. (13 N. Y. 599); Hughes v. Copper Co. (72 N. Y. 207).

The claim that the corporation had a right to recover the amounts of profits made by the trustees for themselves individually in a transaction which they were conducting for the corporation has not yet been noticed. What has been already said is to be applied to this claim. There is no doubt of this general rule that trustees are liable to respond to those for whom they act for any profits made by them individually, but this is limited by the proposition in the language of the court of appeals (Moody v. Smith, 70 N. Y. 598), "a principal may give an agent express power to act in the business of the principal, so that the agent may reap a benefit, and in such case the principal is bound by the acts of their agent." It has been already considered that the shareholders were the real parties interested and that their consent would bind the corporation, and it follows that the corporation would not recover from the trustees, what shareholders had arranged they should individually receive.

This opinion has had in regard solely the right of a member of a corporation to require that corporation to assert for his benefit, a claim for damages in which he may share, when in reality he stands in the shoes of one who took part in the transaction complained of. His want of right to maintain such an action does not affect any claim he may have for individual damage from misrepresentation by the corporation or third parties, nor does it affect the claim of creditors or the liability of the corporation or its trustees to an action by the attorney general.

Judgment affirmed, with costs.

TRUAX, J., dissents.

INGRAHAM, J. — [Concurring.] — I concur with the Chief Judge on the ground stated by him that as Catlow was a party to the agreement under which the stock was issued, and received the benefit of such agreement, he would not be entitled to bring such an action as the present one, and that plaintiff's title to the stock he owns and on which he brings his action, having come through Catlow, he can have no greater right as stockholder than his assignor had.

LONDON TRUST COMPANY, LIMITED, v. MACKENZIE.

1893. 68 Law Times, New Series, 380.1

Trial of action before Wright, J., sitting as an additional Judge of the Chancery Division.

The original plaintiffs were the London Trust Company, Limited, and the Bankers Investment Trust, Limited; suing on behalf of themselves and other shareholders of the Barbadoes Water Supply Company, Limited; and claiming relief against the former directors of the Barbadoes Company, on the ground that the Barbadoes Company had incurred loss through breach of duty on the part of the directors. In the first instance the Trust Companies were the only plaintiffs, the defendants having control of the voting majority when the action was instituted; but subsequently, in accordance with the resolution of a general meeting, the Barbadoes Company were joined as co-plaintiffs.

The Barbadoes Company was formed in 1886. The capital was Iimited to 200,000l. At the end of 1888, the Company had issued only 4853l. shares of 5l. each, and debentures for a total sum of 5100l.

About Jan. 1, 1889, the directors made an agreement in behalf of the company with a firm of contractors; whereby the latter undertook to execute certain works for a specified sum in debentures and fully paid shares of the company (110,000% in cash or debentures, and 50,735% in fully paid shares), and by means of a stipulated portion of those debentures and shares to carry out the provisions of certain contemporaneous agreements, under which debentures and fully paid shares of the company were to be handed over, without consideration, to certain persons (including the directors themselves). This scheme was sanctioned by each existing shareholder and creditor of the company. Each of the shareholders and debenture holders for the time being of the company ultimately took a benefit under one or other of the agreements; each receiving a considerable, though not uniform, bonus.

In order to obtain funds for the purposes of the contract, the directors issued debentures. The prospectus, upon which subscriptions for the issue were invited, did not disclose the above arrangement, nor give any notice that the money raised was to be applied to any other than legal liabilities. The issue was underwritten to the full amount offered for subscription by various financial concerns including the plaintiff trust companies. The underwriting agreement purported to be made with the Barbadoes Company. It states that the debentures are offered at 99½, and that underwriters are to have 2 per cent. commission and a bonus in ordinary shares equal to 25 per cent. of their subscriptions. The plaintiff trust companies subscribed for and

¹ Statement abridged. Part of opinion omitted. - ED.

acquired some of the debentures; receiving from the contractors as a commission a certain number of shares and a money payment from the Barbadoes Company itself. The plaintiffs are now suing as holders of the bonus shares which they received under this agreement.

The defendants alleged, and the plaintiffs appear to have admitted, that no share capital had been issued by the Barbadoes Company since the completion of the above transactions, in April, 1889.

Sir Horace Davey, Q. C., Levett, Q. C., and Waggett, for plaintiffs. [Argument omitted.]

Sir John Rigby, Solicitor General, and Chadwyck Healey, Q. C. (Ingle Joyce and Reginald Hughes, with them), for one of defendants.

Every shareholder, creditor, and debenture-holder of the Barbadoes Company was concerned in the arrangement which is complained of. No person was injured by it, and no shares have since been issued. It was not a scheme to deceive future shareholders, as was the case in Society of Practical Knowledge v. Abbott, 2 Beavan, 559. The scheme was for the benefit of the Barbadoes Company, and the defendants, as directors, committed no breach of duty in making it. Re British Seamless Paper Box Company, 44 L. T. N. s. 498; 17 Chan. Div. 467. By the issue of further shares and debentures, the position of the shareholders and debenture-holders was altered for the worse, and that alteration gave them a right to bargain. The consent of the individual corporations [corporators?] was equivalent to a resolution of the Barbadoes Company, by which it became bound. Re Gold Company, 40 L. T. N. s. 5; 11 Chan. Div. 701; Re Ambrose &c. Co., 42 L. T. N. s. 604; 14 Chan. Div. 390. The plaintiffs must show that what was done was a fraud on the Barbadoes Company. They have not done so. There was, moreover, no purchase by the Barbadoes Company of its own shares. In substance and in form the contractors purchased the shares. The share capital remains the same. The court is not obliged to visit directors with the consequences of acts done in good faith. London Financial Association v. Kelk, 50 L. T. N. S. 492; 26 Chan. Div. 107; Pickering v. Stephenson, 26 L. T. N. s. 608; L. R. 14 Eq. 322.

Levett, Q. C., in reply.

It is conceded that a company can condone or approve matters that are merely *ultra vires* of the directors, but that is not the case with regard to matters *ultra vires* of the company.

Even if the decision in Re British Seamless Paper Box Company (ubi sup.) is now to be regarded as good law, the case does not apply, for there is here no evidence of any resolution, or even of any intention, that no further capital should be issued after April, 1889.

WRIGHT, J. . . . It is important to observe that the new shares issued or intended to be issued to the contractors must have been intended, in the ordinary course of things, to be transferred by the

contractors to other persons, and there is power to issue further shares.

First, it is said that the arrangement was one to which every one who had any interest either as shareholder, or debenture-holder, or creditor, agreed that no one was wronged or defrauded, and that, under the circumstances, the cases of Re The Gold Mining Company (ubi sup.), Re The Ambrose Lake Tin and Copper Company (ubi sup.), and Re The British Seamless Paper Box Company (ubi sup.) applied, and neither the company nor the plaintiff shareholders could complain. But those were all cases of persons who owned the entire capital of the company and intended to remain the sole proprietors, and they were held free to make honest agreements among themselves as to the appropriation of their property, whereas in the present case there was to be a large issue of shares to the contractors, which it must have been intended that the public should take up, and there remained a large part of the share capital to be allotted in the future, and the parties to the present agreements were taking for themselves some 30,000l. of the capital of the company to the detriment of all who might take any such shares, and they were doing so secretly and were misrepresenting by the prospectus and registered deed the real nature of the transaction. It seems to me that the company is entitled to protect the future shareholders and its own funds against such appropriations, and that the very cases relied on by the defendants are authorities for this view. "If," said James, L. J., in the last cited case, "they were intending, although then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the court would feel no difficulty in saying, as Lord LANGDALE did in The Society of Practical Knowledge v. Abbott (ubi sup.), that they intended to commit a fraud."

Objections were raised to the right of the plaintiffs to maintain this action. So far as the company is concerned, it is for the reasons already given entitled to sue in the interest of those who hold the shares issued to the contractors or to be issued to the public. The other plaintiffs are said to be disentitled because their shares are bonus shares, and they are said to stand in the shoes of the contractors from whom they took the shares, and who had notice of all the facts. It is clear, however, that these plaintiffs had no notice of any part of the arrangement, nor any notion that the 28,000% would be applied otherwise than for new works or in liquidation of existing legal liabilities. And I think there is no authority for the general proposition that an ordinary transferee of shares in a limited company is affected by the fact that his transferor had knowledge which would have disabled him from suing. . . . It would seriously affect the position of shareholders in limited companies, and the value of shares.

if it were held that such equities against a transferor affect the rights of transferees for value without notice.

[The learned Judge held, that, to the extent to which the contractors had been provided with debentures and shares to be made over to third parties without consideration, the transaction was ultra vires of the company; and that the directors were liable to make good the loss occasioned thereby.]

CHAPTER XV.

DIVIDENDS. PREFERRED STOCK.

RE SEVERN AND WYE AND SEVERN BRIDGE R. CO.

1896. 74 Law Times, New Series, 219.

(Before ROMER, J., sitting for WILLIAMS, J.)

SUMMONS.

The Severn and Wye Railway and Canal Company (hereinafter called the original company) was incorporated by Act of Parliament in 1809, and under an Act passed in 1879 (42 & 43 Vict. c. clxiii.) this company and the Severn Bridge Railway Company were amalgamated, and the shareholders were united into one company and incorporated under the name of the Severn and Wye and Severn Bridge Railway Company.

By the last-mentioned Act it was provided that the capital of the two companies should after the amalgamation be kept distinct.

The original company was prosperous in its early days, and paid dividends half-yearly on the production to its bankers of a notice issued by the secretary to the shareholders and on their signing a special form of receipt.

Under the authority of another Act, passed in 1894 (57 & 58 Vict. c. clxxxix.), the amalgamated company sold its undertaking to the Great Western and Midland Railway Companies. Sect. 4 of the Act provided that the amalgamated company should be wound up as if it were a company registered under the Companies Acts 1862 to 1890, and had on the day of the passing of the Act passed a special resolution for winding up voluntarily.

After providing for payments required by sect. 7 of the Act of 1894 it was anticipated that there would be a surplus in the hands of the liquidators of £2000, inclusive of £1238 representing unclaimed dividends declared by the original company prior to March, 1878, and this surplus was, under a proviso to sect. 7 of the Act, to be divided amongst the preference and ordinary shareholders of the amalgamated company in certain proportions.

Prior to the amalgamation the dividends appeared in a dividend ledger of the original company, and this practice was continued in the

same book after the amalgamation and down to the 30th June, 1885, each shareholder having an account in the ledger. In December, 1895, these were written off the dividend ledger and transferred to the general ledger to an account headed "Unpaid dividends," the whole being aggregated, and that account had ever since remained in the general ledger. In the half-yearly published accounts down to June, 1885, these dividends were entered under one item of "Unpaid dividends and interest," but in subsequent half-yearly published accounts they were included in an item called "Sundry outstanding accounts." The company had in some cases paid dividends which had been unclaimed for over six years. The £1238 was made up entirely of unclaimed dividends on stock which represented shares in the original company, such dividends having all been declared more than twenty years ago.

This was a summons taken out by the liquidators for the determination by the court of the question whether two sums of £753 14s. 3d. and £349 4s. 3d. representing unclaimed dividends which accrued upon the stocks respectively held by William Robbins and John Sherborne prior to the year 1874, and which remained in the hands of the liquidators should be paid to their respective legal personal representatives, or whether they ought to be treated as part of the general assets of the company available for distribution as such amongst the preference and ordinary stockholders as provided by sect. 7 of the Act of 1894.

F. Thompson for the liquidators.

Vernon R. Smith, Q. C., and Rowden for the stockholders of the amalgamated company. — The claims of the legal representatives of Robbins and Sherborne were barred by the Statute of Limitations, if not at the expiration of six years from the time of the declaration of the dividends, at all events at the expiration of twenty years: (Lindley on Companies (5th edit.), p. 437). As soon as the dividends were declared an action lay to recover them. From that time the company became a simple contract debtor to the shareholders for the amount of the dividends. The entries in the books of the company were entirely consistent with the relationship of debtor and creditor, and cannot be regarded as a sufficient acknowledgment to take the case out of the statute: Bush v. Martin, 9 L. T. Rep. 510; 2 H. & C. 311. They also referred to the Companies Act 1862, s. 16.

Dibdin for the personal representatives of Robbins. — The company held the dividends as trustees for the shareholders, and therefore no question on the Statute of Limitations arises: Smith v. Cork and Bandon Railway Company, Ir. Rep. 5 Eq. 65; Gouraud v. Edison Gower Bell Telephone Company of Europe Limited, 59 L. T. Rep. 813; 57 L. J. 489, Ch.; Re Lands Allotment Company, 70 L. T. Rep. 286; (1894) 1 Ch. 616. The company was in a position analogous to that of a partnership. In the case of a claim by one partner against the other time does not commence to run under the statute until after the dissolution of the partnership: Penny v. Pickwick, 16 Beav. 246; Barton v. North Staffordshire Railway Company, 58 L. T. Rep. 549;

38 Ch. Div. 458. He also referred to Companies Act 1862, Table A, cl. 76; Lindley on Partnership, 6th edit., pp. 511-2; Lindley on Companies, 5th edit., p. 401.

W. M. Cann, for the personal representatives of Sherborne, adopted the same argument.

Vernon R. Smith replied.

Cur. adv. vult.

March 9.—Romer, J., delivered the following written judgment: The liquidators have raised, as they were entitled to do, the defence of the Statute of Limitations in answer to the claims for unpaid dividends, which I have to consider. That defence is, in my opinion, fatal to the claims. The dividends in question were declared and became payable more than twenty years before the present claims were made, and constituted debts due to the shareholders for which they could have sued at law, as was pointed out by Lindley, L. J., in the passage in his treatise on company law (p. 437), which was cited in the argument before me. Presumably, therefore, the Statute of Limitations began to run in favor of the company from the time the dividends became payable.

But the claimants contend that the statute never began to run against them, on two grounds. In the first place, they contend that the company was in the position of a trustee for them of these dividends. my judgment, this was not so. The declaration that the dividend was payable did not make the company a trustee of it for the shareholders. Nor did the company or its successor, the amalgamated company constituted by the Act of 1879, ever constitute itself a trustee. In the books of the two companies an account was kept as of a liability in respect of the unclaimed dividends. But the entry in the books of a debtor of a liability to a creditor does not constitute the debtor a trustee of the amount of that liability for the creditor. There was no setting apart of any special part of the assets of the companies as being or representing these dividends, nor was there any notice given to the shareholders, nor any step taken by the companies, which, so far as I can see, could be treated as putting the companies in the position of trustees or as preventing the Statute of Limitations from running in their favor.

In the next place, the claimants contend that the statute did not run, on the ground that the shareholders and the company were in the position of partners, or in an analogous position. In my opinion that contention is untenable. Nor can I see that the reasons upon which the rule is founded, that the Statute of Limitations does not run in respect of a claim between partners during the continuance of the partnership, apply to a claim for unpaid dividends between a shareholder of an incorporated company and the company. The case of Penny v. Pickwick (ubi sup.), relied on by the claimants, was one of a simple partnership which Lord (then Sir John) Romilly held under the circumstances was a continuing partnership. In the case of Barton v. North Staffordshire Railway Company (ubi sup.) Lord Justice

(then Mr. Justice) Kay decided that where persons entitled as stockholders in a railway company were suing to establish their position as such, their cause of action only arose when the company first refused to treat them as stockholders, and that the Statute of Limitations did not commence to run before that refusal. He did not say that the case was, in fact, analogous to a claim between partners, but only that, if the analogy were applicable, it would support his view, because the statute only runs against a partner from the time of his exclusion.

Nor is the claimants' contention supported by the fact that, for many purposes, the directors of the company are held to be in a fiduciary position with regard to their shareholders as shown by the cases, referred to by the claimants, of Gouraud v. Edison Gower Bell Telephone Company of Europe (ubi sup.) and Re Lands Allotment Company (ubi sup.). For these reasons, in my opinion, the claims fail. I should add that, though I cannot find any decision of the English courts on the point I have had to consider, the view I am taking was expressed in the Irish Court of Appeal by Christian, L. J., in the case of Smith v. Cork and Bandon Railway Company now M. J. Law.

Drewong bue is wrong. LE ROY v. GLOBE INS. CO.

1836. 2 Edwards Chancery (N. Y.) 657.1

THE facts in this case, as they appeared by the pleadings, were briefly these.

The complainant and Catharine A. Newbold, since deceased, as guardians of infants, were stockholders of the Globe Insurance Company. These persons possessed one hundred and ten shares of its capital stock, the par value of each share being fifty dollars. The said company was incorporated for insurance against loss by fire, with a capital of one million of dollars, and conducted its business in the city

At a meeting of the directors of the company held on the tenth day of November, one thousand eight hundred and thirty-five, a statement of its affairs, up to the first of December then next, was exhibited by the proper officers and committees of the company, showing a surplus fund, arising from profits then earned and undivided, amounting to seventy-six thousand four hundred and twenty-nine dollars and sixtynine cents.

On the exhibition of these statements, the directors, by a resolution passed on the same day, declared a dividend of three and one half per centum on the capital stock of the company, for the six months then

¹ Only so much of the case is given as relates to one point. Arguments omitted - ED.

last past, to be paid out of such surplus profits on and after the first day of December then next. This dividend amounted to thirty-five thousand dollars, which sum, on the thirtieth day of November, one thousand eight hundred and thirty-five, was carried, in the books of the company, to the debit of profit and loss; leaving the capital then entire and a further surplus to the credit of the company, for profits then earned and not divided, amounting to forty-one thousand four hundred and twenty-nine dollars and sixty-nine cents. Notice of this dividend and that it would be paid on and after the first day of December was given in the public papers on the eleventh day of November, one thousand eight hundred and thirty-five. Checks or drafts on the Merchants Bank were accordingly prepared, such checks being severally filled up for the amount of the dividend payable to each stockholder. These checks were all dated the first day of December, one thousand eight hundred and thirty-five. They were signed by Henry Rankin, President, made payable to the order of Richard Dunn, Secretary of the company, and were placed in the hands of the latter, to be endorsed by him and delivered over to the stockholders, as they should call for them, on their signing receipts for the same in the dividend book. Between the first and seventeenth days of December, about four-fifths, in amount, of these checks, were called for by and were delivered to stockholders and duly paid on presentment at the bank.

Among the checks thus filled up and signed, was one for one hundred and ninety-two dollars and fifty cents, intended to pay the dividend due to the complainant and Mrs. Newbold on their one hundred and ten shares of stock and to be delivered to them.

On the night of the sixteenth of December, one thousand eight hundred and thirty-five, the great fire took place in the city of New York: the complainant and other stockholders, to the amount of about one fifth in value, not having then called for their dividends. On the eighteenth of the same December, the complainant applied for the check payable to him and Mrs. Newbold, to the secretary, who, acting under the orders of the directors, refused to deliver it or otherwise pay the dividend, on the ground that the company had sustained losses by the fire above mentioned to an amount which had rendered it insolvent. On application to the directors, the same answer was given; and the dividend remained unpaid.

On the twenty-fifth day of January, one thousand eight hundred and thirty-six, the directors declared the company to be insolvent; and three of them, namely, the defendants, Henry Rankin, Isaac Carow and James Heard, were (under the act) appointed receivers of its estate and effects. The declaration of insolvency and a certificate of the appointment of the receivers, both under the seal of the company, were filed with the clerk of the court of chancery for the first circuit; on the same day and thereupon the receivers took upon themselves the duties of their office and possessed themselves of all the estate of the company, including the unpaid portion of the said dividend.

T. L. Ogden, for complainant.

D. Lord, for defendants.

McCoun, Vice-Chancellor. — This case does not necessarily call for a decision of the question, whether, as between the stockholders of an insolvent insurance company and the creditors, the former are entitled to all the surplus which remained with the company undivided at the time of its disaster over and above the entire capital?

Although there is here such a surplus of upwards of forty-one thousand dollars, besides the dividend, amounting to thirty-five thousand dollars, which was declared on the tenth day of November and made payable on and after the first day of December, yet the complainants, in their bill, only claim to have their parts or portions of this dividend, which they have not received, now paid over to them out of the funds in the hands of the receivers, instead of leaving the money there to be applied as assets of the company in discharge of its debts.

The complainants assert their right to the money upon the ground of its having become theirs by an express appropriation and setting apart so much out of the company's earnings for the stockholders and thereby distinguished from the general mass of the company's funds; and I am convinced that enough has been done to produce this separation in the view of a court of equity and to confer upon this amount the character of a trust fund which could not afterwards be diverted to other objects.

The investigation of the affairs of the company and the ascertainment of a clear surplus to warrant a dividend — declaring that dividend by a resolution of the board of directors -fixing the period for its payment - giving publicity to it - carrying the amount on the books of the company to the debit of profit and loss - apportioning the same among the stockholders, by filling up and signing checks upon the bank where the funds were deposited for the purpose of being delivered to each stockholder when called for: - these are all acts which the company, by its officers, might lawfully perform. These acts became binding upon the company in its corporate capacity; and gave to the stockholders individually rights which the directors and officers of the company could not afterwards take from them. If, for instance, they had refused, after the first day of December, to deliver out the checks or make payment of the dividends and no insolvency had intervened, it appears to me there would have been no difficulty in the remedy by mandamus in favor of all the stockholders or by action at the suit of individuals from whom the payment was withheld.

Neither, I apprehend, could there be any valid objection to a bill in equity for the purpose of obtaining possession of the checks or the fund in the bank upon which they were drawn, upon the footing of its being a trust fund which the officers of the company were bound to distribute after the first day of December and over which they had no other control. That the officers of the company considered the money which was deposited to its credit in the bank appropriated to meet the checks

is evidenced by the fact that they went on delivering out checks to such of the stockholders as called for them until the seventeenth of December, when the disastrous fire had occurred; and they would have delivered checks to these complainants in like manner if they had called to receive them. It makes no difference, in my judgment, that the money was not told out and specifically set apart in the bank to meet these checks or that a separate fund was not created for the purpose or that the money intended to meet them still formed a part of the general mass standing to the credit of the company on the books of the bank: for this court can, nevertheless, lay hold of the mass and separate so much as may be necessary to accomplish what was intended and which accident alone prevented at the time. Up to the moment of the prostration of the company, the intention remained, on the part of those who were charged with the management of its affairs, to continue the appropriation and consummate the payment of the dividends which had been nearly completed. It was a matter no longer executory in the view of the parties; and so far as it remained unexecuted this court will now perform it. The intention must be fulfilled; and, for this purpose, a court of equity will consider, not merely the sums which were paid out in dividends, but the whole thirty-five thousand dollars as actually appropriated and set apart for distribution among the stockholders from and after the first day of December and regard it as a trust fund to which the stockholders had acquired vested rights - not in their corporate capacity, but as individuals to whom the money legally and equitably belonged distinct from their other interests in the funds and effects of the company.

Having acquired this right, as between them and the corporation, the assignment or transfer to the receivers could not take it away. The receivers do not stand in the light of purchasers for valuable consideration without notice; and, under such circumstances as exist here, are bound by the trust: Adair v. Shaw, 1 Sch. & Lef. 262; Wood v. Dummer, 3 Mason's R. 312.

The act of the eighteenth of January, one thousand eight hundred and thirty-six, under which the receivers were appointed, vests in them all the property and effects of the corporation; but, like any other assignment by operation of law, such as in bankruptcy or under our insolvent acts it does not pass trust property — but only such as the bankrupt or insolvent held or was possessed of or entitled to for his own benefit.

I shall decree that the receivers hand over to the stockholders the amount of the unpaid dividend declared on the tenth day of November and payable on the first of December, 1835; . . .

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Drietly Contra 117 Mo. appents

FORD v. EASTHAMPTON RUBBER THREAD CO.

1893. 158 Mass. 84.

CONTRACT for money had and received. At the trial in the Superior Court, without a jury, before Aldrich, J., there was evidence tending to show that the plaintiff on June 16, 1891, owned fifty-two shares of the capital stock of the defendant company, of the par value of one hundred dollars per share; that on that day the directors passed the following vote, namely, "That a dividend of 20 per cent be paid to stockholders of this date, payable Tuesday, June 23d, 1891"; that on said June 16th the annual meeting of stockholders of the company for the election of directors was held immediately after the meeting of directors, according to custom, and duly elected five directors, as provided by the by-laws of the company, two only of the old directors being re-elected, and no director being re-elected who voted for the twenty per cent dividend, though the two who were re-elected were present at the meeting when it was voted; and that on said June 16th, as soon as the stockholders' meeting adjourned, the directors elected and re-elected thereat met, qualified, organized for the year, and passed the following votes: "That the vote passed by the directors of this company this day declaring a dividend of 20 per cent on the capital stock of the company, payable Tuesday, June 23d, 1891, be reconsidered and rescinded; the same is hereby rescinded. That a dividend of six per cent, payable June 23d instant to stockholders of record this day, be declared in place of the dividend voted at earlier meeting of this board this day." It also appeared that no money was set aside or provided to pay said dividend of twenty per cent, but the company had ample means and facilities for paying the twenty per cent dividend; that always before money had been provided to pay a dividend before it was declared; that money to pay said six per cent dividend was provided after the meeting and before said 23d of June by borrowing, and the same was set aside and deposited in bank therefor; that the treasurer sent the check of the defendant on the bank where the money was deposited to each stockholder of record of said June 16th to pay the dividend on his stock at six per cent, including the plaintiff, on said 23d June, 1891; and that the plaintiff declined to accept the check, and returned the money to the treasurer. It further appeared in evidence that no stockholder of the defendant had been paid the twenty per cent dividend for June, 1891; that a majority of the stockholders had accepted the dividend of six per cent paid by checks as aforesaid on June 23, 1891, in full; that the plaintiff, by his attorney, by letter of June 30, 1891, demanded payment of the twenty per cent dividend from the defendant; and that the plaintiff made no objection to the check of the defendant sent him to pay the dividend of June 16,

1891, except that it was for a dividend of six per cent, instead of twenty per cent.

The defendant asked the court to rule that the directors elected on June 16 had a right on that day to rescind the vote whereby the twenty per cent dividend was declared payable at a future day; and that the plaintiff could not recover. The judge declined so to rule, ordered judgment for the plaintiff, and reported the case for the determination of this court. If the refusal to rule and order of judgment were correct, judgment was to be affirmed; otherwise, judgment was to be ordered for the defendant.

G. M. Stearns, for the plaintiff.

W. G. Bassett, for the defendant.

FIELD, C. J. It seems to be settled that, when a dividend has been fully declared, the corporation thereby manifests its intention that the amount of the dividend should be considered as having been separated from the other property of the corporation, and as having become the individual property of the stockholders, and that therefore, when the dividend becomes payable according to the terms of the vote declaring it, each stockholder has a right to demand payment of the proportional part of the dividend which belongs to his shares of stock, and to sue the corporation for it, if it is not paid on demand. In some cases money or other property equal to the whole amount of the dividend declared has been specifically set apart as a fund appropriated to the payment of the dividend, and the stockholders have been regarded as the cestuis que trust of this fund, each entitled to his share. In other cases, the corporation has credited the stockholders with the amount of their shares of the dividend, and the stockholders have assented to this, and the amount so credited has been regarded as a debt of the corporation to the stockholders; or the corporation has paid to some of the stockholders their shares of the dividend, and has refused to pay anything to the others, and it has been held that the corporation must pay all See Beers v. Bridgeport Spring Co. 42 Conn. 17; State v. Baltimore & Ohio Railroad, 6 Gill, 363; King v. Paterson & Hudson River Railroad, 5 Dutch. 504; Jermain v. Lake Shore & Michigan Southern Railway, 91 N. Y. 483; Hopper v. Sage, 112 N. Y. 530: Jackson v. Newark Plankroad Co. 2 Vroom, 277; Wheeler v. Northwestern Sleigh Co. 39 Fed. Rep. 347. When a dividend has been declared payable at a definite future time, but no fund has been set apart for the payment of the dividend, and the corporation meanwhile becomes insolvent, whether the stockholders to the extent of their proportions of the dividend should share ratably with the creditors of the corporation in its property has not, so far as we know, been recently considered, but the decision in Lowene v. American Ins. Co. 6 Paige, 482, is that they should. The setting apart of a fund to pay a dividend has been held to give a lien upon it to the stockholders, which they can enforce to the exclusion of the general creditors of the corporation. In re Le Blanc, 14 Hun, 8, and 75 N. Y. 598. Le Roy

v. Globe Ins. Co. 2 Edw. Ch. 657. The English Companies' Act, 1862, (25 & 26 Vict. c. 89, § 38, cl. 7,) provides that "no sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves." Upon these questions, however, we desire to express no opinion.

It has been argued that there is no consideration for the promise of a corporation to pay a dividend to its stockholders, but we think that the doctrine of consideration applicable to a simple contract between persons having no fiduciary relations to each other is not applicable to such promise. It is the object of a private business corporation to make money for its stockholders, and, under our laws, it is ordinarily the duty of the directors from time to time to declare dividends out of the net earnings, if there are any, and it must be left largely to the discretion of the directors to determine when and for how much such dividends should be declared. The whole property of the corporation is held on a sort of trust for the stockholders, and the directors are, in a general sense, the managers; and when a dividend is declared by the directors, the declaration is a determination by a body authorized to make it that the amount of the dividend should be taken from the property of the corporation and paid over to the stockholders. The cause of action of each stockholder against the corporation for non-payment of the dividend does not arise from any actual contract between the corporation and its stockholders, but from the nature of the organization, and the relation of the stockholders to the corporation and its property. Unless the rights of creditors intervene, or the corporation is enjoined from paying the dividend, on the ground that the dividend has not been earned, or on some other ground, the amount of the dividend, after it has been declared and has become payable, is considered as property held by the corporation for the use of the stockholders individually, and the stockholders may recover their shares as money or property had and received to their use. We have been able to find little or no authority on the precise question involved in this case, namely, whether, after a dividend has been duly declared by a vote of the directors, but payable at a future time, the vote can be rescinded at a subsequent meeting of the directors, held before the time at which the dividend becomes payable according to the vote, when the fact that a dividend has been declared has not been made public, or in any manner communicated to the stockholders, and when no fund has been set apart for the payment of the dividend. On principle, we do not see why the directors may not rescind such a vote, under the circumstances stated. By the vote no specific property passed to the stockholders. If the vote be regarded as a declaration of trust in favor of

the stockholders, it could be revoked before it was communicated to them or any property was identified and set aside for them. Indeed, cases may easily be supposed of such a change in the affairs of a corporation, between the time when a dividend is declared and the time when it becomes payable, as to make the exercise of such a power by the directors useful, if not necessary, for the successful continuance of the business of the corporation. It appears in the present case that the meeting of the new directors at which the vote was rescinded was held after the annual meeting of the stockholders, but on the same day as the meeting of the directors at which the vote was passed, which was held just before the meeting of the stockholders; and that at the meeting of the stockholders "the president did not, as had for many years been the custom, announce that any dividend had been declared, or promulgate the same to the stockholders"; and it does not appear that any of the stockholders, except the directors, knew of the original vote, or that any of the stockholders had made any contracts, incurred any liability, or done anything relying on the vote. It also appears that no fund was distinctly set apart for the payment of the dividend before the vote was rescinded. As the passage of the vote did not constitute an actual contract of the corporation with its stockholders, but was merely a mode of dividing the earnings of the property of the corporation among the stockholders, we are of opinion that before the division had been actually made, and before the position of the stockholders had been changed in reliance on the vote, - certainly before the passage of the vote had been made public, or communicated to the stockholders, - it was within the power of the directors, at a meeting subsequent to that at which the vote was passed, to rescind it. In this action at law, we cannot supervise the exercise of this power by the directors. Judgment for the defendant.

McNAB v. McNAB & HARLIN MANUF. CO., ET ALS.

1891. 69 New York Supreme Court (62 Hun.), 18.1

NEW YORK Supreme Court, General Term, First Department. Appeal from Special Term, New York County.

Action brought to compel the division of a surplus among the share-holders. A judgment was rendered, dismissing plaintiff's complaint. Plaintiff appealed.

Artemus V. Smith, for appellant.

Frederic R. Coudert and Frederic G. Dow, for respondents.

Daniels, J. The McNab & Harlin Company, defendant, was incorporated on or about the 28th of April, 1871, under the laws of this

¹ Only so much of the case is given as relates to one point. - ED

state providing for the incorporation of manufacturing companies. Its business was declared to be that of manufacturing brass and iron goods for sale, and since its incorporation it has carried on that business. The plaintiff was the owner of 8 shares of its capital stock, which consisted of 150 shares, of \$1,000 each, and the other defendants were officers and shareholders in the company. After its formation, and in or about the year 1877, the company became unable to pay its debts, and a proceeding in bankruptcy was instituted to discharge it from its debts. Soon after the proceeding was commenced the defendant Harlin became the president of the company. He owned seventy-eight shares of its capital stock, and compromised the debts owing to the creditors of the company. The agreement for the compromise was to pay seventyfive per cent. within the period of three years. After he took charge of the affairs of the company as its president, and under his management, the business became prosperous, and the seventy-five per cent. was paid to the creditors, and afterwards they were paid the additional sum of twenty-five per cent., making payment of their demands in full. The prosperity of the company continued, owing to the judicious management of the president, and for eight years prior to the time of the trial, which took place in May, 1891, its net profits amounted to the sum of \$100,000 a year, or a sum slightly in advance of that amount, and from the year 1881 to the year 1891 it made and paid a dividend on its shares amounting to an average exceeding the sum of twenty-five per cent.; and, in addition to the dividends made in this manner, it accumulated a large surplus, which was mainly used in its business, but to the extent of about one hundred thousand dollars was in its deposit accounts. And it was stated by the treasurer in his evidence upon the trial that there was at that time an actual surplus owned by the company amounting to the sum of \$152,209, and the plaintiff, whose action was brought to secure the distribution of the surplus by way of dividends, alleged and claimed that a still larger surplus had been earned and was owned by the company; and it was one of the principal objects of the action to secure the division of this surplus by way of dividends among the shareholders. proved in the course of the trial that the surplus maintained by the company was profitably employed in purchasing the material used by it in the course of its manufactures, and that it was considered for the best interests of the company not to divide this surplus among the shareholders. The directors, in restricting the dividends as they did, seem to have been impressed with the propriety of this conviction, and the dividends were accordingly limited to such amounts from year to year as did not intrench upon the large surplus which had been earned and secured. In their action upon this subject the trustees appear to have exercised the judgment which they deemed to be most consistent with the prosperity and maintenance of the interests of the company, and the statute under which the incorporation took place delegated the authority of the trustees to manage the stock, property, and concerns

of the company (2 Rev. St., 5th Ed., p. 503, § 29;) and to what amount the dividends shall be made, and the extent of the surplus which the interests of the company may require to be retained, are within this delegation of authority confided to the trustees. And it was so regarded in Williams v. Telegraph Co., 93 N. Y. 162, where it was said, with the apparent approval of the court, that "when a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts." Id. 192. And no broader principle than this was either stated or sanctioned in Scott v. Fire Co., 7 Paige, 198, or in either of the other authorities which have been brought to the attention of the court. The principle to be applied is that which shall secure the observance of good faith on the part of the directors, and this principle was neither denied nor intrenched upon in Seeley v. Bank, 8 Daly, 400, which was affirmed in 78 N. Y. 608. The trustees are chosen by the shareholders, to exercise their best judgment, depending upon their knowledge of the affairs and condition of the company; and when that has been done, the courts do not undertake to control their action, although they might differ in their views of the proper management to be adopted and followed. No reason has been disclosed by the case for doubting or impeaching the good faith of these trustees. Neither can it be affirmed justly, in view of the large business carried on by the company, that they acted unreasonably or capriciously in declining to order a larger dividend than that which was in fact paid to the shareholders.

[Opinion on other points omitted.]

Judgment affirmed.

STRINGER'S CASE. IN RE MERCANTILE TRADING CO.

1869. L. R. 4 Chan. Ap. 475.

This was an appeal from an order of Vice-Chancellor Malins, made in the winding up of the Mercantile Trading Company, Limited.

The company was registered under the Companies Act, 1862, on the 27th of June, 1863. The objects of the company, as stated in the memorandum of association, were the purchase of goods and ships for export and transmission to America, for sale or barter and return and sale of goods from thence, and the chartering or freighting of ships, and all other matters necessary for carrying on the operations of the company, or other operations of a similar character. It was, however, admitted that the real object of the company was to trade with the Confederate States of America, by running the blockade then maintained by the government of the Federal States. For this purpose

they provided a line of ships running from Bermuda to Charleston and Wilmington, which were intended to carry goods from England to the Confederate government, and to bring back cargoes of cotton in return.

The company had a nominal capital of £150,000, of which about £112,000 had been paid up. The articles of association embodied the rules given in Table A of the *Companies Act*, 1862, which provide, in Rule 73, that "no dividend shall be payable except out of the profits arising from the business of the company, except so far as modified by the articles;" and the articles provided, by Article 5, that "the directors shall declare a dividend on the subscribed capital of the company as soon and as often as the profits of the company in hand are sufficient for payment of a dividend of £5 per cent. on such capital, subject to the resolutions of a general meeting of the company called with reference thereto."

Shortly after the establishment of the company, the directors entered into a contract with the *Confederate* government, under which the *Confederate* government agreed to be co-owners of the ships employed by the company, and that the ships should be owned in the proportion of two-thirds by the *Confederate* government, and one-third by the company; the ownership of the *Confederate* government to be paid for in cotton, at *Charleston* or *Wilmington*, on the basis of 6d. per pound for "*Middling Upland*" cotton.

Several successful trips were made by the ships, and although some of them were captured or lost, a considerable profit was at first made by the company on their adventures. In May, 1864, a balance sheet was made out of the state of the company, down to the 29th of February, 1864, showing a profit of £42,718 15s. 2d., out of which the directors proposed a dividend to be paid at the rate of £25 per cent. on the capital, amounting to about £28,000. This dividend was adopted by a general meeting of the company, held on the 17th of May.

The balance sheet was submitted to the directors of the Agra and United Service Bank, the company's bankers, and was examined by their accountants. The bank then advanced them upwards of £21,000 towards the payment of the dividend to the shareholders, although their account was already overdrawn to the amount of £5000. The dividend received by Mr. E. P. Stringer, the managing director, in respect of his shares, amounted to £3560.

The termination of the civil war in America, by the success of the Federal government, caused the failure of the company, the cotton appropriated to them in the Confederate States being all destroyed or captured, and the debt due from the Confederate government turning out worthless. The company was accordingly wound up, the only creditor of large amount being the Agra and Masterman's Bank, which had succeeded to the business of the Agra and United Service Bank. The present application was made by the official liquidator to obtain a repayment by Mr. Stringer of the dividend received by him, on the ground that

the balance sheet was delusive, and the dividend really paid out of the capital of the company. The sections of the *Companies Act*, 1862, under which it was contended that the Court had jurisdiction to order the return of the money upon this application, were the 101st and

165th.

The principal objections made to the balance sheet were as follows: First, that the directors had taken credit for a sum of £51,589 due to the company from the *Confederate* government as an asset of the company at its full value; secondly, that they had also taken credit for cotton within the *Confederate States*, which was all subsequently destroyed, at the value of £17,000; and, thirdly, that they had entered the loss of three ships as a loss of only one-third of their value, thus reckoning the guarantee of the *Confederate* government for the other two-thirds at its full value.

The Vice-Chancellor was of opinion that the dividend declared was altogether delusive, and that it amounted to a return of one-third of the capital to the shareholders; but he also held that he had no jurisdiction under the 101st or 165th sections of the *Companies Act*, 1862, to make an order for the return of the dividend; but that it was necessary for the official liquidator to file a bill for that purpose. The official liquidator appealed from this decision.

Cotton, Q. C., and Higgins, for appellant.

The declaration of the dividend was both in violation of the articles and delusive, amounting to a return of part of the capital. Table A of the Companies Act, 1862, which was adopted by the company, forbids payment of dividend out of capital, and the 5th clause of the articles is still further restrictive, providing that the dividends are to be paid out of "profits in hand." So far was the company from having profits in hand that they were obliged to borrow part of the money to pay the dividend from the Agra and Masterman's Bank. But the balance could not be called profits in any sense until it was known whether the cotton in the Confederate States and the debt of the Confederate government could ever be realized. The directors were not justified in putting a value upon what they could not realize, and which it was very doubtful whether they would ever be able to realize. At all events, the value put upon these items was much too high. No cotton in the Confederate States or liability of the Confederate government bore such a high price in the market at that time as was put upon these items in the balance sheet.

Glasse, Q. C., and H. M. Jackson, for Stringer.

There is nothing in the articles to render this dividend improper. The 5th clause does not mean that the directors were only to pay profits out of money at their bankers. They were to estimate the profits in the usual mercantile way, that is, by valuation of the assets of the company. This was done; there was no concealment on the balance sheet, and it was submitted to the Agra and Masterman's

Bank, who understood all the circumstances, and would not have advanced the money unless the balance sheet had been honestly made. And yet they are the very parties who are now, through the official liquidator, complaining of it. At that time the prospects of the Confederate cause and the security of the government were thought good by most mercantile men, and it is not right to judge of the fairness of the transaction by the result of the speculation.

[The opinion of Sir C. J. Selwyn, L. J., is omitted.]

SIR G. M. GIFFARD, L. J. [After deciding that the Court has power, under the Companies Act, to order a repayment of dividends declared and paid under a delusive and fraudulent balance sheet:]

Now, with regard to this case, the first important matter that we have to consider is the effect of these articles of association, and I quite agree that if the effect of these articles was that you could have no division of dividends until all the transactions were wound up, that you could have no legal dividend except out of what is termed profits in hand, there might be a great deal to be said in this case; but if we look at the articles of association as compared with Table A., it is clearly manifest that the articles of association amount to nothing of the kind. [His Lordship then referred to the provisions in Table A., and in the articles of association, which have been before mentioned, and continued: - I have no hesitation in saying - especially if you compare the word "may" in Table A., and the word "shall" in the 5th clause, and consider that there are negative words in Table A., and that there are none in this clause - that this clause was intended simply to have this effect, and no other, viz., that when the directors had in their hands profits they should not be able to set them aside for a contingency fund, and that they should then, at all events, be compellable to make a dividend. It did not prevent their making a dividend; but I agree, it must be out of profits, although those profits were not profits in hand.

Then, when we come to the facts themselves—I will not again go through them, for they have been considered at very considerable length, not only in argument, but also by my learned brother—it was not argued or suggested, nor could it be argued or suggested, that it was intended that this thing, though in terms a dividend, should cover what was not really a dividend transaction. The mode in which the matter was done was fair enough. The books were put into the hands of an accountant, calculations were made, and a certain conclusion was arrived at. True it is, no doubt, that these proceedings were full of risk; but although, on the one hand, there might be a great loss, everyone knows that whenever there was a success the profits were something very enormous, and upon the balance sheets as taken from the books it did appear that there was a profit of £42,000, and it was proposed out of that to divide somewhere about £28,000, the profits, I agree, not being profits in hand. The fault that is found with that is, that the

estimate was an erroneous estimate; that too sanguine a view was taken of the prospects of success; and that there ought to have been a very much less sum put upon the face of this balance sheet as assets than really was put there. But I do not think that anyone can say it was not at this date possible for honest persons carrying on this trade, entertaining the view which they did entertain as to their prospects, honestly to make out such a balance sheet as this, and honestly to believe that those were profits fairly divisible between them. As I have said before, this was not done in any underhand manner; the whole thing was patent and open; it was known, or capable of being known, by every shareholder, and if the directors of the Agra and Masterman's Bank did not know anything about it, they neglected their duty, and behaved most shamefully to their own shareholders whose money they lent; for the balance sheet was put in their hands, and they had accounts of every description, and they must have known perfectly well that it was neither more or less than a blockade-running company; the very nature of the accounts shewed it; and so far from there being any concealment, the balance sheet itself was put into the hands of the auditors, and no person who knew what the business of the company was could look through that balance sheet without seeing at once that the full value was put upon the Confederate government debt, and that the four ships had been lost, and without knowing at once that if things turned out adversely that which was profit might, from subsequent events, become a great loss. Again, this dividend was declared in May, 1864, and was actually paid in June, 1864, and I cannot forget that it was actually paid by the Agra and Masterman's Bank, who not only advanced the money, knowing the affairs of the company, but who paid the dividends through the medium of cheques drawn upon them by the shareholders. I think it would be a gross injustice if at this distance of time, when a dividend has been made and paid in this way so long ago as the year 1864, because things turn out adversely afterwards, and the company is wound up in 1867 at the instance of a creditor, such a dividend should be repaid. I quite agree when there has been what can be termed fairly a misappropriation of assets as against a creditor, that creditor has a right in the winding-up to have those assets recouped; but I cannot think that such a dividend as this was in any sense a misappropriation as against either the Agra and Masterman's Bank or any other creditors, or that it was in any sense delusive, or in any sense a fraudulent transaction, or that it was any other transaction than this, viz., that mercantile men who were engaged in adventures which might result in very great or even total loss, and which might also result in very great profit, took a sanguine view of what the value of the assets was, looking at what at that date was the actual profit made, and acted upon that bond fide, not intending to defraud in any way any person whatever.

Therefore, I am of opinion that this appeal must be dismissed with costs.

McDONALD, RECEIVER, v. WILLIAMS.

1899. 174 United States, 397.1

Surr by receiver of the Capital National Bank of Lincoln, Nebraska, to recover from defendants, stockholders in the bank, the amount of certain dividends previously received by them.

Upon a trial in the U. S. Circuit Court there was a decree in favor of plaintiff for the recovery of a part of the sums claimed. Both parties appealed. Upon the argument of the appeal in the Circuit Court of Appeals, that court desired the instruction of the Supreme Court on certain questions.

It appears from the statement of facts made by the court that the bank suspended payment in January, 1893, in a condition of hopeless insolvency, the stockholders, including the defendants, have been assessed to the full amount of their respective holdings, but the money thus obtained, added to the amount realized from the assets, will not be sufficient even if all dividends paid during the bank's existence were repaid to the receiver, to pay seventy-five per cent. of the claims of the bank's creditors.

This suit was brought to compel the repayment of certain dividends paid by the bank to the defendants on that part of the capital of the bank represented by their stock of the par value of \$5000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank, and not out of net profits.

A list of the dividends and the amount thereof paid by the bank from January, 1885, to July, 1892, both inclusive, is contained in the statement, and it is added that all dividends, except the last, (July 12, 1892,) were paid to the defendant Williams, a stockholder to the amount of \$5000, from the organization of the bank. The last dividend was paid to the defendant Dodd, who bought Williams' stock, and had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend, down to and including July, 1891, was declared and paid, there were no net profits. The capital of the bank was impaired, and the dividends were paid out of the capital, but the bank was still solvent. When the dividends of January and July, 1892, were declared and paid there were no net profits, the capital of the bank was lost, and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank, and believing the dividends were coming out of the profits.

¹ Statement abridged. Part of opinion omitted. The docket title of this case is Hayden, Receiver, v. Williams. — ED.

Upon these facts the court desired the instruction of this court for the proper decision of the following questions:

First question. Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of the profits, and when the bank, at the time such dividend was declared and paid, was not insolvent?

[The second question is omitted.]

Edward Winslow Paige, for appellant.

Theodore De Witt (George G. De Witt with him), for appellees.

PECKHAM, J. . . . The complainant bases his right to recover in this suit upon the theory that the capital of the corporation was a trust fund for the payment of creditors entitled to a portion thereof, and having been paid in the way of dividends to the shareholders that portion can be recovered back in an action of this kind for the purpose of paying the debts of the corporation. He also bases his right to recover upon the terms of section 5204 of the Revised Statutes.

We think the theory of a trust fund has no application to a case of this kind. When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation.

In Graham v. Railroad Company, 102 U. S. 148, 161, it was said by Mr. Justice Bradley, in the course of his opinion, that "when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors, and a court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

And in Hollins v. Brierfield Coal and Iron Company, 150 U. S. 371, 383, 385, it was stated by Mr. Justice Brewer, in delivering the opinion of the court, and speaking of the theory of the capital of a corpo-

ration being a trust fund, as follows:

"In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the clutch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for

the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And also:

"The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or, sometimes, even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

Other cases are cited in the opinion as holding the same doctrine. In Wabash, etc., Railway Company v. Ham, 114 U. S. 587, 594, Mr. Justice Gray, in delivering the opinion of the court, said:

"The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property.

The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

It is contended on the part of the complainant, however, that if the assets of the bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent; that the mere fact that the value of the assets of the corporation has sunk below the amount of its debts, although as

yet unknown to any body, cannot possibly make a new contract between the corporation and its creditors. In case of insolvency, however, the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank in paying could bestow no title in the money it paid to one who did not receive it bona fide and for value. The assets of the bank, while it is solvent, may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency, and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say, that if such a dividend be recoverable, it would be on the principle of a trust fund.

Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations. Where there is no statute providing what particular act shall be evidence of insolvency or bankruptcy, it may be and it sometimes is quite difficult to determine the fact of its existence at any particular period of time. Although no trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is, even in such case, may be somewhat difficult to accurately define, but it may be admitted in some form and to some extent to exist in a case of insolvency.

Hence it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different principles than in a case of solvency. And so of acts committed in contemplation of insolvency. The fact of insolvency must be proved in order to show the act was one committed in contemplation thereof.

Without reference to the statute, therefore, we think the right to recover the dividend paid while the bank was solvent would not exist.

But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

The section provides that "no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he in such case within the meaning of the statute withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is in effect the assertion by the board of directors that the dividend is made out of profits. Believing that the dividend is thus made, the shareholder in good faith receives his portion of it. Can it be said that in thus doing he withdraws or permits to be withdrawn any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the declaration. We think this language implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly yet in entire good faith receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must be employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that Congress intended by the use of the expression "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any

portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case.

We are strengthened in our views as to the proper construction of this act by reference to some of its other sections. The payment of the capital within a certain time is provided for by sections 5140 and 5141. Section 5151 provides for the individual responsibility of each shareholder to the extent of his stock at the par value thereof in addition to the amount invested therein. (These shareholders have already been assessed under this section.) And section 5205 provides for the case of a corporation whose capital shall have become impaired by losses or otherwise, and proceedings may be taken by the association against the shareholders for the payment of the deficiency in the capital within three months after receiving notice thereof from the Comptroller. These various provisions of the statute impose a very severe liability upon the part of holders of national bank stock, and while such provisions are evidently imposed for the purpose of securing reasonable safety to those who deal with the banks, we may nevertheless say, in view of this whole system of liability, that it is unnecessary, and that it would be an unnatural construction of the language of section 5204 to hold that in a case such as this a shareholder, by the receipt of a dividend from a solvent bank, had withdrawn or permitted to be withdrawn any portion of its capital.

We may concede that the directors who declared the dividend under such circumstances violated the law, and that their act was therefore illegal, but the reception of the dividend by the shareholder in good faith, as mentioned in the question, was not a wrongful or designedly improper act. Hence the liability of the shareholder should not be enlarged by reason of the conduct of the directors. They may have rendered themselves liable to prosecution, but the liability of the shareholder is different in such a case, and the receipt of a dividend under the circumstances is different from an act which may be said to be generally illegal, such as the purchase of stock in one national bank by another national bank for an investment merely, which is never proper. Concord First National Bank v. Hawkins, just decided. ante. 364.

The declaration and payment of a dividend is part of the course of business of these corporations. It is the thing for which they are established, and its payment is looked for as the appropriate result of the business which has been done. The presumption of legality attaches to its declaration and payment, because declaring it, is to assert that it is payable out of the profits. As the statute has provided a remedy under section 5205 for the impairment of the capital which includes the case of an impairment produced by the payment of a dividend, we think the payment and receipt of a dividend under

the circumstances detailed in the question certified do not permit of its recovery back by a receiver appointed upon the subsequent insolvency of the bank.

The facts in the various English cases cited by counsel for complainant are so entirely unlike those which exist in this case that no useful purpose would be subserved by a reference to them. Not one holds that a dividend declared under such facts as this case assumes can be recovered back in such an action as this.

We answer the first question in the negative.1

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BRIGHT v. LORD.

1875. 51 Indiana, 272.

From the Marion Superior Court.

J. E. McDonald, J. M. Butler, H. W. Harrington and H. Francisco, for appellant.

N. B. Taylor, F. Rand, E. Taylor, B. Harrison, C. C. Hines and W. H. H. Miller, for appellees.

BIDDLE, C. J. — The facts averred in the appellant's complaint are as follows:

That on the 1st day of April, 1873, the appellant entered into a provisional contract with John M. Lord, John Lord, and Charles M. Lord, by which they agreed to sell to the appellant five hundred and twenty shares of the capital stock of the Indianapolis Rolling Mill Company, of fifty dollars each, for the sum of thirteen thousand dollars, at the option of the appellant, to be by him taken at any time on or before the 18th day of June, 1873, to be paid for on delivery; that before the expiration of said option, on the 14th day of June, 1873, the said Lords, for the consideration of one hundred dollars, to them paid by appellant, extended the time of said provisional contract for thirty days, within which time the appellant paid the Lords thirteen thousand dollars, and received the stock, which, on the 16th day of July, 1873, was duly transferred to him on the books of the Rolling Mill Company; that the appellant purchased the stock without the reservation of any dividends or earnings, and with all the benefits and interests that pertain to the same; that on the 3d of July, 1873, the board of directors of the Rolling Mill Company declared a dividend on the capital stock of the company of five per cent., to be paid on the 1st day of August ensuing, amounting, on the stock, etc., purchased by

1 After the Supreme Court had given the above opinion, the Circuit Court of Appeals rendered judgment against the receiver as to the dividends in the years when the bank was still solvent, and against the defendant stockholders for the dividends paid during insolvency. LACOMBE, J., said: "No question was propounded" (i. e., to the Supreme Court) "as to the dividends paid when the bank was actually insolvent, as we had no doubt the receiver could recover them in a proper action." Hayden v. Williams, 96 Federal Reporter, 279, pp. 283, 284. See, also, Grant v. Ross, A. D. 1896, 100 Kentucky, 44.— Edge.

the appellant, to thirteen hundred dollars, which the appellant claims; that the company was about to pay the said thirteen hundred dollars to the Lords, who also claimed the amount. Prayer to restrain the company from paying the thirteen hundred dollars to the Lords, to decree the amount to the appellant, and for general relief.

The Rolling Mill Company was served with process, but made default.

Interlocutory proceedings were had after complaint and before answer, but as no question is raised upon them, they are not stated.

The Lords answered by a general denial. The case was submitted to the court for trial, which resulted in a finding for the defendants. Motion for a new trial overruled. Exception. Appeal to the general term, where the judgment was affirmed, from which an appeal was taken to this court.

The only error assigned here is in affirming the judgment at the general term. The evidence is before us, and we think it fairly proves the allegations in the complaint.

Was the appellant entitled to the dividend declared while it was optional with him to purchase or refuse the stock, and before the purchase was completed? This is the sole question in the case.

Where a stockholder in a railroad assigned and transferred his stock after two years interest had accrued, which, by a resolution of the company was payable annually, and had been carried to the account of the stockholder, it was held that the interest did not pass by the assignment of the stock; the court stating the rule to be, that "the interest follows the principal, as an incident to it, so long as it remains an incident; but when it is separated and set apart from the principal 4 by actual payment, or by being carried, when due, to the credit of the owner of the principal in his account with the debtor, and this in pursuance of a provision in the contract creating and defining the principal debt, it is so separated and disjoined from the principal as to cease to be an incident to, and does not follow it." The City of Ohio v. The Cleveland, etc., R. R. Co., 6 Ohio St. 489. And in the case of Jones v. The Terre Haute & Richmond R. R. Co., 29 Barb. 353, it was held, that "where, by a resolution of the board of directors, a dividend is made to the persons then holding stock, without any discrimination, out of the surplus earnings of the corporation for a given period, payable at a future day, all who are stockholders on the books of the company, at the time the dividend is declared, are entitled to share therein." This case seems to us as being remarkably similar to the one before us. It has also been held that the purchaser of a share of stock in a corporation has the right to receive all future dividends, from whatever source the profits may arise, provided he remain a taember of the corporation until a dividend is made. March v. The Fastern R. R. Co., 43 N. H. 515.

The same rule was recently held in England. The testatrix was raner of certain shares in the South Australian Banking Company.

On the 7th day of June, 1865, dividends were declared by the company, payable on the 15th of July, 1865, and on the 15th of January, 1866. On the 31st of December, the testatrix died, having made her will, devising the stock, in 1863.

The question arose as to whether the dividend due on the 15th of January, 1866, passed to the devisee, or belonged to her residuary estate.

Sir W. Page Wood, V. C., said: "As soon as the dividend was declared, although payment, for convenience of the company, was postponed until the following January, from that moment the testatrix became entitled to it, although she could not have then recovered it, and it would have passed to her legatee had she specifically bequeathed it." De Gendre v. Kent, 4 Equity Cases, 283.

In an American case, still later, it was held that a dividend belongs to the owner of the stock, at the time the dividend is actually declared, and that dividends made to the stockholders after the death of a testator belong to the widow who owns the stock, but if made before, although payable afterwards, they will pass by the devise. Brundage v. Brundage, 65 Barb. 397.

In support of this general principle, see, also, In re Foote, 22 Pick. 299; Clapp v. Astor, 2 Edwards Ch. 379; Phelps v. Farmers and Mechanics Bank, 26 Conn. 269; Hyatt v. Allen, 56 N. Y. 553.

From the authorities and upon principle, we think the rule may be deduced, that whoever owns the stock in a corporation at the time a dividend is declared owns the dividend also; and a sale of the stock afterwards will not carry the dividend with it, though it may not be paid, or payable, until after the sale. The same rule governs in the sale of bonds or other securities, where the interest is payable at stated periods, as upon coupon bonds; but when the interest is accruing from day to day, whatever is due on the bond or other security at the time it is sold, will pass with it. The reason of the distinction is, that when the interest accrues from day to day, it is divisible and payable at any time; but when the interest is payable at stated periods, no part of it is due until the period arrives; and in the earnings or profits of stocks, it is impossible to know what amount is due until the dividend is declared.

In the case before us, Bright did not become the owner of the stock until the 16th day of July, 1873. Up to that time, it was optional with him to purchase it or refuse it. The Lords would have had no remedy, if Bright had refused the stock, and Bright would have suffered no loss, except the consideration he had paid for the option, and incurred no liability, whatever. The dividend had been declared on the 3d day of July, 1873, and the amount fixed, by which it became the property of the Lords at that time, although not payable until the 1st day of August ensuing; and there is nothing in the completed the purchase of the stock. At least, ordinary business diligence

would have informed him of the facts, if he did not actually know them, and then he could have purchased the stock, as it then stood, or not, at his option. As he has not averred in his complaint that he did not know these facts, and could not have ascertained them by ordinary business diligence, he must be held to have known them, and to have made his 11 M. Las purchase accordingly.

The judgment is affirmed.

TAFT v. HARTFORD, PROVIDENCE, & FISHKILL R. CO.

1866. 8 Rhode Island, 310.1

Assumpsit for the recovery of the amount of dividends, at ten per cent. per annum, for eight years, upon 402 shares of the capital stock of the defendant corporation, (as the plaintiff argues,) "not as arrears of dividends unpaid, but as their equivalent, as damages, for the nonperformance of the defendants' contract that they should be paid." The case was submitted upon the pleadings and a statement in writing of the facts.

On Oct. 25, 1854, the corporation had only common stock. At a meeting of the stockholders held that day, acting under an amendment to the charter, the following votes were passed: -

"Voted. That five thousand shares of one hundred dollars each be and the same are hereby created and added to the capital stock of this company, and that the same be a preferred and guaranteed stock, entitling the holder thereof to preferred and guaranteed dividends equal to ten per cent. per annum, payable semi-annually. And no dividend shall be paid on the remaining shares of said stock until such semi-annual dividends, at the rate of ten per cent. per annum, above mentioned, shall first have been paid on said guaranteed or preferred stock. Provided, that said preferred stock shall be issued on the express condition following, viz.: that at any time after the first day of April, 1860, or after the first day of April, 1865, as the directors shall decide, said company reserve, and shall have the right to redeem and extinguish the whole or any part of said preferred stock, by paying to the holder thereof, on the books of said company, the par value of one hundred dollars for each and every share held by him, her or them, and that, at any time after the time or times fixed by the directors, any holder of said preferred stock shall have the right to demand and receive for the whole or any part thereof, one hundred dollars for each share, and all right to further dividends on said preferred stock, that shall have been so paid for or redeemed, shall thereafter cease and determine.

"Voted. That the guaranteed dividend of ten per cent. on such pre

¹ Statement abridged. Portions of argument omitted. - Ep.

ferred stock, to all subscribers who pay for the same in money previous to said first day of April next, shall begin to accrue on and from the day when the money for said stock shall have been paid to said company."

Subsequently a circular was issued offering the new stock to subscribers, and containing, *inter alia*, the following statement:—

"Guaranteed dividends, at the rate of ten per cent. a year, will commence from the time when the money is actually paid for said preferred stock."

Subscribers for the new stock received certificates in the following form : —

BE IT KNOWN, That entitled to shares in the preferred and guaranteed stock of the Hartford, Providence and Fishkill Railroad Company, on which one hundred dollars, on each share, have been paid, subject to the provisions of the charter, and the bylaws of the corporation, the same being entitled to preferred and guaranteed dividends, at the rate of Ten Per Cent per annum, payable semi-annually, before any dividend shall be paid on other stock of said company; and being redeemable by the company, and the par value thereof demandable by the holder of the same, from the company, at any time after April 1st, 1865.

No dividends were earned by the corporation.

Durfee and Eames, for plaintiff.

The word guarantee, though most usually employed to designate a contract by which one person becomes answerable for another, is not unfrequently employed to express an unusually emphatic assurance of a party in his own behalf, as in Section 4, Article IV., of the Federal Constitution. Will the Court say that a word which is constantly selected by the company to characterize and denominate the subject to which it applies, is simply tautological?

Could the company have supposed that the subscribers for stock would expurgate or ignore the word "guaranteed," or would interpolate after it, the incompatible qualification, "if the net earnings of the road suffice for the payment of such dividends?"

Suppose that, for ten years after the issue of the new stock, the company barely make enough to pay interest and expenses; and that at the end of ten years they redeem the new stock and the road becomes prosperous. According to the view which we are combating, the subscribers are not entitled to dividends for the ten years that are gone, because none were earned; and they are not entitled to dividends for the future, because they have ceased to be stockholders.

And, as to the word "dividends," we maintain that it was not used by the parties in its ordinary sense, as signifying a certain proportion of the earned profits of the road; but as signifying that the holders should be entitled to receive, in value, what was equivalent to ten per cent on the amount which they had paid from the time of payment; . . . The expression is equivalent to the word interest at the fixed rate.

But even if the word "dividends," as used in connection with the word "guaranteed," means, in its true import, dividends out of the net earnings of the road, as claimed by the defendants, the defendants do not advance a step in the defence to the action. If the dividends were to be paid out of the net earnings of the road, they were, nevertheless, guaranteed or stipulated to be paid out of such net earnings. In other words, the guaranty was, that the net earnings should be sufficient to pay a dividend equal to ten per cent per annum; and if the result was that such earnings were insufficient for that purpose, there was none the less a breach of the guaranty, on the part of the defendants, that they should be sufficient, for which an action will lie to recover, by way of damages, the amount which the plaintiff would have received if such net earnings had been sufficient to pay the stipulated ten per cent.

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Currey (Blake with him), for defendants.

[Argument omitted].

Bradley, C. J. The defendant corporation was authorized, by an amendment to its charter, to issue five thousand shares of additional stock, and to provide that the same be "a preferred and guaranteed stock, entitling the holder to preferred and guaranteed dividends equal to ten per cent. per annum, payable semi-annually." Pursuant to this authority this stock was issued, and the certificates entitled "preferred and guaranteed ten per cent. stock," contained the expression, "the same being entitled to preferred and guaranteed dividends at the rate of ten per cent. per annum, payable semi-annually, before any dividend shall be paid on any other stock in said company." This suit is brought to compel the company to pay the plaintiff, holding a portion of said stock, a sum of money equal to ten per cent. per annum on his stock, though no dividends have been earned.

The question presented is, what is the meaning and engagement of the company, as expressed in these words? The relations between these parties are obviously those between shareholders and the corporation. They are not, on the face of the contract, those of creditor and debtor. A corporation may issue bonds or other obligations convertible at certain times and upon certain contingencies into stock. They may issue stock, as in this case, redeemable at a certain time and upon certain conditions. But until such change is made in either case, the original relation remains. A holder of the stock retains his right to share in the management of the corporation and to participate in its profits. He is not its creditor by virtue of this relation. If he is to be constituted its creditor, there are well-known modes and words by

which that relation can be expressed. If, instead of adopting them, he receives a certificate of stock, and then claims to be both its creditor and stockholder by virtue of the same contract, the burden is upon him to show that such anomalous relation exists. The presumptions of law and the usual course of business are against him. In this case, the evidence of the relation is a certificate of stock, and the subject of the engagement or contract is the dividends, so called, to be paid upon it. A dividend is money paid out of profits by a corporation to its shareholders. A preferred dividend is that which is paid to one class of shareholders in priority to that to be paid to another class.

The word over which the controversy arises in this case is "guaranteed." Guaranteed, in addition to preferred, applied to dividends, means what? It is certainly not used in the strict and proper sense of the word, for there is, in this contract, no third party promising to make good an engagement by the corporation to its stockholders. Is it, on the one hand, an instance of that tautology so common in legal proceedings, - a synonym for "preferred," and not increasing its significance? Or does it, on the other hand, when it is added to the word dividend, entirely change its character and meaning, and convert a dividend, which, in its nature, cannot legally exist except when originating in profits, into a liability entirely independent of the pre-existence of such profits? Or has it still a third signification, by which, added to the idea of a simple preference out of dividends, it shall be considered as an engagement that a dividend, equal to the sum of ten per cent. per annum, shall be charged upon all the profits which, from year to year, may accrue, thus binding and pledging the total sum of all the earnings of the company, so long as the engagement lasts, to the payment of a dividend "equal to," as the amended charter says, -"at the rate of," as the company express it, — as much as ten per cent. per annum, if semi-annually paid, would amount to, and this amount to be paid before the other stock receives anything.

Intervening the two arguments in this cause, the Court examined, and desired the counsel to examine, beyond our own libraries, the decisions of the courts upon this subject, to see if this somewhat anomalous expression had received a judicial or practical construction. Among the emergencies so common to these railway companies in our country. and in that from which we derive our language and so much of our law, we thought it not unlikely that similar circumstances had induced similar contracts, and that the language used by this company, doubtless under the advice of counsel, might have been taken from railway legislation, or contracts elsewhere, and with a full knowledge of its legal and practical meaning. In this country we found no decision throwing light on this question. In England, however, there are several. The most apt of these cases is, perhaps, Henry v. The Great Northern Railway Company, 3 Jurist, part i. p. 1,133. An act of Parliament in that case authorized the company "to guarantee the payment of dividends," not exceeding a certain per cent., "and in preference to the payment thereof on other shares." The question in this, as in the other English cases over similar words, was between what we have indicated as the first and third construction. It has never been even claimed in the English courts that the construction secondly stated by us, and urged by the plaintiff, could be adopted, and the court decides that these statutes guarantee to the favored stockholders "a charge on all accruing profits at the stipulated rates, before anything is divided among the ordinary shareholders. This is substantially interest chargeable exclusively on profits." And they further hold that if the profits, accrued when the dividend is declared, are insufficient to furnish the stipulated amount, the deficiency is a charge upon subsequent profits. Again, in Crawford v. North Eastern Railway Company, 3 Jurist, N. S. part i. p. 1,093, Vice-Chancellor Wood says, in conclusion: "Of course, I do not mean to say that it is a guaranty in any other sense than that you are to be paid these sums out of the profits of the company. That is the only fund you are to look to. If the company make no profits you will have no dividend, but, I apprehend, the profits in perpetuity." In Matthews v. Great Northern Railway Company, 5 Jurist, N. S. part i. p. 284, the Vice-Chancellor says of the term "guaranteed share:" "It must be a guaranty limited, at least, to the whole profits made by the railway."

Without dwelling longer upon this and similar authorities, it is perfectly apparent that the guaranty of a dividend by a railway company is considered by the courts, and, it seems from the course of the argument by the counsel in these causes, who, doubtless, faithfully represent the interests and wishes of their clients, by the business community also, to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend, and not a debt, which is thus preferred and guaranteed; and as the statement of facts admits that dividends have not been earned in this case, the plaintiff, if there were no other difficulties in his way, could not recover, and we must give judgment for the defendant.

Ordinarily, preferred shareholders have no preference in the distribution of the company's capital, when the business is wound up. A right of this kind cannot be presumed from the fact that a preference has been given in the payment of dividends; but, under an express agreement, a preferred shareholder may be entitled to withdraw the amount of his shares before the other shareholders can take anything. The rights of the preferred member are thus assimilated in many respects to those of a creditor. 1 Morawetz on Corporations, 2d ed. s. 461.

^{1 &}quot;There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every corporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for." Lurron, J., in Hamlin v. Toledo, &c., R. Co., A. D. 1897, 78 Federal Reporter, 664, p. 671. — ED.

CHAPTER XVI.

TRANSFER OF SHARES.

DUNCUFT v. ALBRECHT.

1841. 12 Simons, 189.1

BILL IN EQUITY, praying that defendant be decreed to specifically perform an oral contract for the sale to the plaintiff of shares in a railway company.

Defendant demurred to the bill, for want of equity.

G. Richards, and Mylne, in support of the demurrer.

Secondly: the Court will not enforce the agreement in this case; for shares in a railway company, fall within the description of goods, wares and merchandizes; and, by the 17th section of the Statute of Frauds (29 Car. 2, c. 3) it is enacted that no contract for the sale of any goods, wares and merchandizes, for the price of 10l. or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. In this case, none of those requisites has been complied with. Shares in a public company, have been held to be goods, within the purview of the 72d section of the Bankrupt Act (6 Geo. 4, c. 16). Cooper v. Elston; 2 Smith v. Surman; 8 Mussell v. Cooke. 4 All that the case of Bradley v. Holdsworth 5 decides, is that railway shares are not an interest in or concerning lands, tenements or hereditaments, and, therefore, not within the 4th section of the statute.

Knight Bruce, and Piggott, appeared in support of the bill, but

¹ Statement abridged. Part of argument omitted. Only so much of the opinion is given as relates to a single point.—Ed.

² 7 T. R. 14.

^{8 9} Barn. & Cress. 561. See the Judgment of Littledale, J., p. 571.

^{*} Prec. Ch. 533.

⁵ 3 Mees. & Wels. 422.

The Vice Chancellor [Shadwell], without hearing them, said:
I do not feel any difficulty about this case; because I think that the verbal agreement, as it is stated, is quite sufficient.

In my opinion this is a case to which the 17th section of the Statute of Frauds does not apply; because it is impressed upon my mind that, in the decisions which have been made with respect to the 17th section, it has been held to apply only to goods, wares and merchandizes which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or of hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be, in effect, personal estate; but not personal estate of the quality of goods, wares and merchandizes within the meaning of the 17th section.

Then there is nothing, as I understand, either in the Statute of Frauds or in the law of this Court, which prevents the execution of such an agreement as is here stated: and, though it may be true that the Plaintiff has asked more than this Court would give or might give under certain circumstances; my opinion is that he has stated quite enough to show that he is entitled to some relief: 1 and, therefore, the demurrer must be overruled.2

TISDALE v. HARRIS.

1838. 20 Pickering (Mass.), 9.3

Assumpsit on an oral agreement of the defendant, to sell to the plaintiff two hundred shares, with all the earnings thereon, in a Connecticut corporation.

Verdict for plaintiff. Motion to set aside verdict. One ground of the motion was, because the contract set up was within the statute of frauds.

Bartlett and F. C. Loring, for the motion.

C. P. Curtis, and B. R. Curtis, contra.

SHAW, C. J. [After deciding another question.] But by far the most important question in the case, arises on the objection, that the case is

above reported.

¹ See Hibblewhite v. M'Morine, 6 Mees. & Welsb. 200; Adderley v. Dixon, 1 Sim & Stu. 607; Ex parte The Lancaster Canal Company, Montagu's B. C. 116; and Humble v. Mitchell, 2 Railway Cases, 70; S. C. 11 Ad. & Ell. 205.

² On the 23d of July, 1841, The Lord Chancellor affirmed the decision in the case

⁸ Statement abridged. Citations of counsel omitted. — Ep.

within the statute of frauds. This statute, which is copied precisely from the English statute, is as follows: "No contract for the sale of goods, wares or merchandise for the price of ten pounds (\$33.33) or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agent, thereunto lawfully authorized."

This being a contract for the sale of shares in an incorporated company in a neighboring State, for the price of more than ten pounds, and no part having been delivered, and no purchase money or earnest paid, the question is, whether it can be allowed to be good, without a note or memorandum in writing, signed by the party to be charged with it. This depends upon the question, whether such shares are goods, wares or merchandise within the true meaning of the statute.

It is somewhat remarkable that this question, arising on the St. 29 Car. 2, in the same terms, which ours has copied, has not been definitively settled in England. In the case of Pickering v. Appleby, Com. Rep. 354, the case was directly and fully argued, before the twelve judges, who were equally divided upon it. But in several other cases afterwards determined in Chancery, the better opinion seemed to be, that shares in incorporated companies, were within the statute, as goods or merchandise. Mussell v. Cooke, Prec. in Ch. 533; Crull v. Dodson, Sel. Cas. in Ch. 41.

We are inclined to the opinion, that the weight of authorities, in modern times, is, that contracts for the sale of stocks and shares in incorporated companies, for more than ten pounds, are not valid, unless there has been a note or memorandum in writing, or earnest or part payment. 4 Wheaton, 89, note; 3 Starkie on Evid. 4th Amer. Edit. 608.

Supposing this a new question now for the first time calling for a construction of the statute, the Court are of opinion that as well by its terms, as its general policy, stocks are fairly within its operation. The words "goods" and "merchandise," are both of very large signification. Bona, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word "merchandise" also, including in general objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies.

There are many cases indeed in which it has been held in England, that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and thence it has been argued that they cannot be considered as merchandise, because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal, and coercive, and tended to deprive a man in trade of all his property. But most joint

stock companies were founded on the hypothesis at least, that most of the shareholders took shares as an investment and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man should not be deemed a merchant so as to subject himself to the highly coercive process of the bankrupt laws. These cases, therefore, do not bear much on the general question.

The main argument relied upon, by those who contend that shares are not within the statute, is this. That statute provides that such contract shall not be good &c., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication, the statute applies only to goods, of which part may be delivered. This seems however to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods &c. shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which from their nature it cannot apply.

There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary indicia of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the term goods, as they are within the reason and policy of the act, the Court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action. As to the argument, that here was a part performance, by a payment of the money on one side, and the delivery of the certificate on the other, these acts took place after this action was brought, and cannot therefore be relied upon to show a cause of action when the action was commenced.

Verdict set aside and plaintiff nonsuit.

WHITE, EXECUTOR, v. SALISBURY.

1862. 33 Missouri, 150.1

THE appellant sued the respondents upon the following instrument of writing:

"We, the undersigned, agree to pay and deliver to William White, or order, seven hundred and seventy-seven dollars and sixteen and three-fourths cents in railroad stock of the North Missouri Railroad Company, the same to be delivered to him on or before the fifteenth day of July next, which amount is understood to be seven shares and .77\(^2_4\) of a share. The above shares are given in discharge of a note given by L. W. Salisbury to William White for \$616.72, and dated February 21, 1853. L. W. Salisbury, H. D. Brown. Test: W. G. Shackelford. Dated 22d June, 1857."

Plaintiff averred in his petition that the defendants had failed to comply with their contract, in not delivering the railroad stock on or before the fifteenth day of July, 1857, the time agreed upon for its delivery, and claimed damages to the amount of the consideration advanced by White to Salisbury & Brown, being the note he (White) held on Salisbury for the sum of \$616.72.

The answer of the defendants denied that plaintiff was entitled to damages, as claimed, or in any sum; that defendants did, in compliance with the terms of their contract, on the fifteenth day of July, 1857, have the requisite number of shares entered in the name of William White upon the books of the North Missouri Railroad Company.

This cause was submitted to the court without a jury, and the following declarations of law were prayed by plaintiff:

1. That, under the terms of the contract read in evidence between the plaintiff's testator and defendants, the defendants were bound to deliver on or before the fifteenth day of July, 1857, a certificate of the stock contracted to be delivered, and that a transfer upon the books of the company, on the fifteenth day of July, 1857, or at any previous time, without any notice to White, is not in law a sufficient delivery under said contract.

The Court refused the instructions, and gave a judgment for the defendants.

Jones & Hayden, for appellant.

I. That under the contract a transfer or entry upon the books of the company of the amount of stock contracted to be delivered was no delivery, either actual or symbolical.

[Remainder of argument omitted.]

Sharp & Broadhead, for respondents.

I. The act of respondent Salisbury, in procuring a transfer of the amount of the stock called for by the contract on the books of the

¹ Part of case omitted. - ED.

North Missouri Railroad Company, is a substantial compliance with the contract. It may be safely stated, that upon an agreement for the sale of personal chattels, where the property is in its nature intangible and incapable of manual or actual delivery, that if the vendor, by his act, passes the title to the vendee and puts it out of his power to recall it, that it amounts to a delivery. (Acts of 1853, pp. 325 & 326, sec. 8.) This was done by act of the company, and the mere fact that the new certificates of stock were handed to defendant did not vest him with any authority or control over them; they were issued to White, and White alone could control the stock or re-assign it. (5 W. & Serg. p. 106.)

[Remainder of argument omitted.]

DRYDEN, J. The defendants, by the contract sued on, agreed to deliver to the plaintiff's testator, on or before the fifteenth of July, 1857, seven 77-100 shares of stock in the North Missouri Railroad Company. The main ground of controversy in the court below was as to what was required to be done by the defendants to comply with their engagement, the plaintiff maintaining that the delivery of certificates of stock to his testator was essential; while it was insisted by the defendants that a transfer of the stock to him on the books of the company was what was necessary, and all that was requisite. We think the defendant's theory the correct one. The end the parties intended to accomplish was to confer upon the plaintiff's testator the title and ownership of the stock contracted for. The delivery of the certificates from one party to the other would leave the title to the stock just where it was before. The only effectual mode of transferring the title was by a transfer on the books of the company, and by that means only.

The eighth section of the amended charter of the North Missouri Railroad Company, (Sess. Acts of 1853, p. 325-6,) provides that, "when payment for the stock of any subscriber or stockholder shall be fully made, the president and directors shall deliver one or more certificates of such stock, signed by the president, and countersigned by the treasurer, under the seal of the company, to such subscriber or stockholder. for the number of shares belonging to him or her, which certificates shall be transferable in a book to be kept for that purpose by the company, and, when transferred, shall be delivered up to the president and directors and be cancelled, and new certificates be issued to the assignee." In the Agricultural Bank v. Burr, 11 Shepley (Me.) R. 263. shares of bank stock had been transferred to the defendant on the books of the bank, but no certificate of stock had been issued to him. The question arose whether he was a stockholder. Mr. Justice Shepley, in delivering the opinion of the court, says, "a person becomes legally entitled to shares so transferred to him upon the books of the bank. The certificate is but additional evidence of his titles." Same Bank v. Wilson et al. 273, is to the same effect. (Ellis v. Essex Merrimack Bridge Co. 2 Pick. 243; Chester Glass Co. v. Dewey, 16 Mass. 94.)

[Remainder of opinion omitted.]

BOATMEN'S INSURANCE AND TRUST CO. v. ABLE.

1871. 48 Missouri, 136.1

Error to St. Louis Circuit Court.

Glover & Shepley, for plaintiff in error.

Sharp & Broadhead, for defendants in error.

Bliss, J. Defendants were indebted to the plaintiff by a promissory note for \$4,000 and Able, the principal upon the note, owned stock in the company. Upon maturity of the note, defendant Able proposed to sell the plaintiff his stock in part payment, and to his proposition received the following reply:

"DEAR SIR: I am instructed to receive your eighty shares of Boatmen's Insurance stock at fifteen dollars per share, and credit the amount on your new note for \$4,000 payable at thirty days after date. If the above proposition meets your views, you will please send your note and your stock certificate by your boy, and step in yourself and transfer the same on the books of the company.

Yours respectfully,

EDW. BROOKS, Sec'y. The new note was sent in without the certificate, and a few days after, Mr. Able called and said his stock certificate was mislaid, but that he would look it up, and signed upon the stock-book of plaintiff the usual blank transfer of his stock, to be filled up by plaintiff's officers. Not being able to find his certificate, he again calls and asks that the price of the stock be indorsed upon the note without its production; but plaintiff's secretary refused to make the indorsement unless Mr. Able would obtain a new certificate and assign it by complying with the terms of one of the company's by-laws. This Mr. Able would not do. The new note went to protest, and this suit is brought to recover its amount. The answer sets up part payment by a transfer of the stock, and the reply denies the transfer. The only question of fact put in issue was whether the stock was actually transferred or not; and the court, finding the affirmative of that issue, gave judgment for the balance due on the note. Even if we thought that the preponderance of evidence showed that plaintiff's officers took the assignment conditionally, and never intended to receive the stock unless the certificate was given up, and hence that it was not in fact transferred, yet the court below found otherwise, and that finding we cannot review, but can only inquire whether the court was justified in refusing the following declaration of law asked by plaintiff: "If the court find that plaintiff agreed with defendant Able to take eighty shares of stock, standing on their books in his name, and credit \$1,200 on the debt in suit, without knowing said Able could not produce his certificate for said shares for cancellation, plaintiffs were not bound to enter said credit without such

¹ Arguments omitted. — Ep.

production of said certificate for cancellation; and if said Able would neither produce said certificate for cancellation nor take steps provided by plaintiff's by-laws to procure another certificate in case of loss, the verdict should be for plaintiffs."

This declaration, if made, would have been defective in ignoring several facts, among which was the actual assignment upon the company's books; nor does it seem to have been drawn with a careful reference to the issue. The question was transfer or no transfer, purchase or no purchase, and it only touches that question argumentatively. With reference to this issue, the scope and effect of the instruction must be understood to be that there could have been no transfer of the stock without a surrender of the stock certificate, unless such surrender was waived by the purchaser, and that this stock was not in fact transferred for want of compliance with the requirements of the company's by-laws in obtaining a new certificate for surrender. Had the declaration predicated the agreement to purchase upon such surrender, as a condition of receiving the stock, it would have been so far clearly right, for the plaintiff's officers had a right to affix any condition to their agreement they saw fit. They certainly had a right to insist that the outstanding stock certificate should be given up, and to refuse to receive a transfer until it was done. But the declaration does not do that; and if the construction I have given it be the correct one, the plaintiff is made to claim that no credit should be given for the stock, although it may have been legally transferred. We have, then, only to consider whether the transfer could have been in fact made without the production of the certificate, and not whether defendant Able failed to comply with a reasonable condition in an agreement to purchase. Upon this point there can be no doubt. Plaintiffs' charter, approved January 26, 1864 (§ 8), expressly provides that the stock shall "be assignable only on the books of the company," and thus adopts the rule applicable to the transfer of corporation stock, whether expressed in the charter or not, with its corollary that such assignment upon the books passes the title. (White, Ex'r, v. Salisbury, 33 Mo. 150.) It is also a recognized rule in the sale of stock that an assignment or transfer of a stock certificate will not of itself pass the title to the stock, although, like an agreement in writing to sell land, it gives an equity, and the assignee of the certificate can compel a transfer upon the books except as against a bona fide purchaser who has acquired a title by such transfer. (Sargent v. Franklin Ins. Co., 8 Pick. 90; Sargent v. Essex M. R. C., 9 Pick. 202; Com. Bank v. Cartwright, 22 Wend. 348; Chouteau, etc., v. Harris, 20 Mo. 382.)

The fear that there might be such outstanding equity that would give trouble to the purchaser, would be a very good reason on his part for insisting, as a condition of purchase, that the certificate be surrendered. But when no such condition was insisted on, and the transfer was in fact made, such fear would be no excuse for refusing payment. The purchaser in that case would assume the risk of all the trouble that

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might arise from the outstanding certificate. The court below found this fact against the plaintiff, and, having so found it, committed no error in refusing the declaration of law he sought.

The judgment will be affirmed. Judge Wagner concurs. Judge Currier not sitting.

COMMONWEALTH v. CROMPTON.

1890. 137 Pa. State, 138.1

IN THE MATTER of the escheat of the estate of Alexander McNaughton, deceased.

Issue between the Commonwealth and Mrs. Susan Crompton, administratrix. McNaughton died intestate, unmarried, without issue; and, so far as known, leaving no kindred. Proceedings for an escheat were instituted in behalf of the Commonwealth. Mrs. Crompton introduced evidence that McNaughton had boarded in her family for many years, that she did his washing and mending, and that he said he would pay her some day; also that, some months before his death, he gave her a box, telling her it would be of some use to her after he died. She took the box, but did not open it until after his death, when it was found to contain a United States bond, and certificates of various shares of railroad stock [standing in the name of McNaughton, and without any transfer signed by him].

The jury were instructed that if McNaughton did give her the property in the box in the manner testified to, or any other manner, the verdict must be for the defendant.

Judgment having been rendered on the verdict, the plaintiff appealed. Samuel Gormley (John E. Faunce and Frederick Gaston, with him), for appellant.

J. Henry McIntire and F. Carroll Brewster, for appellee.

McCollum, J. [After deciding other points.] A gift needs no consideration to support it, yet in the present case there was a valuable one acknowledged by the donor, and impelling him to the action which is the subject of this controversy. For twenty-one years he lived in the family of the donee as a boarder, and had his washing and mending done there, and for these he promised to pay her. He was in poor health the last four years of his life, and required and received from her and her children considerate care and attention. He often manifested grateful appreciation of these services, and expressed a purpose to make compensation for them. In execution of this purpose, he delivered to her the box containing the government bond and the cer-

Statement abridged. Arguments and part of opinion omitted. — ED.

tificates of railroad stock. It is apparent from the evidence that he intended to make an absolute gift of these securities to her, and that he supposed the delivery, and the words accompanying it, invested her with the exclusive control and ownership of them. There remains for consideration the question whether the failure to make a formal written transfer of the securities to the donee will defeat the purpose of the donor and give them to the commonwealth as an escheat.

It is now settled that a valid gift of non-negotiable securities may be made by delivery of them to the donee without assignment or indorsement in writing. This principle has been applied to notes, bonds, stock and deposit certificates, and life-insurance policies. In Pennsylvania, Wells v. Tucker, 3 Binn. 366; Licey v. Licey, 7 Pa. 251, and Madeira's App., 17 W. N. 202, are illustrations of and rest upon it, and it has distinct recognition and approval in other deliverances of this court. Walsh's App., 122 Pa. 177, we refused to extend it to a depositor's bank-book, but acknowledged "that, in the case of notes and other instruments payable to order, a delivery accompanied by words importing a present absolute gift would invest the donee with the ownership of the fund." The bank-book was regarded as on the same footing as a book of original entries, and the mere delivery of it to the donee as insufficient to pass any title to the accounts appearing upon it. But "a certificate of deposit is a subsisting chose in action, and represents the fund it describes, as in case of notes, bonds, and other securities, so that delivery of it as a gift constitutes an equitable assignment of the money for which it calls:" Basket v. Hassel, 107 U. S. 602. In the case last cited, Mr. Justice Matthews, after an exhaustive examination of the authorities, said: "The point which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee so as to vest him with an equitable title to the fund it represents and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift inter vivos, but upon the recognised conditions subsequent, in case of a gift mortis causa."

The shares of stock are choses in action, and the certificates evidence of the title to them: Slaymaker v. Bank, 10 Pa. 373. Why may not a delivery of the certificates, coupled with words of absolute and present gift, invest the donee with an equitable title to the stock, which the donor or a volunteer cannot successfully assail? A stockholder may clothe another with the complete equitable title to his stock without compliance with the forms printed by the corporation: United States v. Vaughan, 3 Binn. 394; Commonwealth v. Watmough, 6 Wh. 117; Building Ass'n v. Sendmeyer, 50 Pa. 67; Finney's App., 59 Pa. 398; Water-Pipe Co. v. Kitchenman, 108 Pa. 630.

As the gift in question was supported by a valuable consideration, and the instruments which represented the ownership of the donor in

the subject-matter of the gift were delivered to the donee, we think she has a title to the securities which cannot be destroyed in a proceeding by the commonwealth to escheat them.

Judgment affirmed.

MATTHEWS v. HOAGLAND.

1891. 48 New Jersey Equity, 455.1

ONE question in this case was whether certain shares in the Camden & Amboy R. R. Company were the property of the estate of the late Henry Matthews. It was claimed on behalf of two of his children that he gave these shares to them. Mrs. Hoagland, one of the children, testified in substance, that her father handed the certificate of this stock to her brother, John H. Matthews, in her presence, telling him that this was for his sister and himself, and that he (the father) wanted the brother and sister to have it whilst he was living.

Martin L. Trimmer and Charles A. Skillman, for plaintiff.

J. Newton Voorhees and Albert D. Anderson, for various defendants. Green V. C.

These shares are on the face of the certificate in the name of Henry Matthews, and declared to be "transferable only by him, or by his legal representatives, on the books of the company, on the surrender of this certificate." The certificate has on its back a printed blank assignment and power of attorney for the transfer of the stock by the record owner.

The provisions of charters, or of by-laws, under the statute (Rev. p. 181 \S 26), that stock of the corporation shall be transferable only on the books of the company, are held to be intended merely for the protection of the company.

It is settled that one in possession of a certificate of stock in an incorporated company, accompanied by an assignment in blank, executed by the record owner, with an irrevocable power of attorney, authorizing the transfer of the stock, is presumptively the equitable owner of the shares, whose title thereto cannot be impeached if he has given value for them without notice of any intervening equity. Rogers v. New Jersey Insurance Co., 4 Halst. 167; Broadway Bank v. McElrath, 2 Beas. 24; affirmed in Hunterdon County Bank v. Nassau Bank, 2 C. E. Gr. 496; Mount Holly Co. v. Ferree, 2 C. E. Gr. 117; Prall v. Tilt, 1 Stew. Eq. 479; Del. & Atl. R. R. v. Irick, 3 Zab 321; State, Bush, v. Warren F. Co., 3 Vr. 439.

¹ The greater part of the case is omitted. — ED.

The reason of the rule is, that the record owner has done everything in his power to effect the transfer, and by such act has assigned all interest he may have had, and surrendered all indicia of ownership — as to third parties, holders for value, he is estopped from asserting ownership (McNeil v. Tenth National Bank, 46 N.Y. 325; Williams v. Col. Bank, L. R. (38 Ch. Div.) 388; affirmed L. R. (15 App. Cas.) 267—as to volunteers, the gift is complete and irrevocable if inter vivos.

In England, stocks, shares, bonds, debentures and other securities which are not assignable at law unless duly transferred, must be duly transferred, and not merely assigned or covenanted to be transferred, to constitute a valid gift. May Fraud. Conv. *413; Antrobus v. Smith, 12 Ves. 39; Dillon v. Coppin, 4 Myl. & C. 647; Searle v. Law, 15 Sim. 95. The Companies Clauses act of 1845 requires such assignments to be by deed, and to be delivered to the officer of the company, without which formalities the legal title will not pass. Nanney v. Morgan, L. R. (37 Ch. Div.) 346. The English cases proceed on the ground that the title not having passed by a legal assignment, equity will not interfere to enforce an equitable title of a volunteer.

The same is the effect of the decisions in Maryland, unless the transfer is made complete in the lifetime of the donor, on the ground that the power of attorney does not survive him (Pennington, Admr., v. Gitting's Exrs., 2 Gill. & J. 209; Balt. Retort and Fire Brick Co. v. Mali, 65 Md. 93), while in other states the mere delivery without endorsement or written assignment of the certificate of stock with words of gift are held sufficient. Commonwealth v. Crompton (Pa.), 20 Atl. Rep. 417; Ridden v. Thrall (N. Y.), 26 N. E. Rep. 627; Hopkins v. Manchester (R. I.), 19 Atl. Rep. 243.

Smith v. Burnet, 8 Stew. Eq. 314, in the court of errors and appeals, on the question of gift, turned on the point that there was no such delivery of the stock as implied an intention, on the part of the donor, to

give it absolutely, or to abandon control of its proceeds.

The ordinary, in Dilts v. Stevenson, 2 C. E. Gr. 407 (at p. 413), says: "To constitute a perfect gift the donor must part with the possession and dominion of the property. And if the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed" - citing 2 Kent Com. *439. The rule, thus broadly given in the last sentence, has undoubtedly, since Chancellor Kent so stated it in his commentaries, been greatly relaxed in many jurisdictions with reference to money obligations, and in others to all choses in action, while Judge Grover, in Gray v. Barton, 55 N. Y. (at p. 73), quotes the same extract with approval. In many cases in that state the principle seems to be disregarded. There is great diversity of opinion evinced by the decisions in other jurisdictions, but I am unable to find any authority in this state which would indicate a departure from the principle stated.

The relaxation of the rule elsewhere seems to have resulted from the culing as to money obligations, and gifts causa mortis.

There seems, however, to be every reason why it should be adhered to in a case of an alleged gift *inter vivos* of stock, both from the nature of the subject-matter, and from the incidents of such gifts.

There is a wide difference in the character of property in shares of stock and that in money obligations.

Chief-Justice Shaw, in Fisher v. Essex Bank, 5 Gray 373 (at p. 377), speaking of the character of property in shares of stock, and wherein it differs from a money obligation, says: "A nearer analogy, perhaps, is that of a chose in action, capable, like this, of being assigned in equity, by a delivery over of the certificate, which is the assignor's muniment of title, with an assignment duly executed, transferring to the assignee all the assignor's right, title and interest. And yet it is not like the assignment of a chose in action, which is the transfer of the assignor's interest in a debt, and vests in the assignee an equitable right to collect the debt in the name of the assignor.

"The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concern; to share in the dividends of profits, and to receive an aliquot part of the proceeds of the capital, on winding up and terminating the active existence and operations of the corporation. Again, when a transfer is rightfully made and complete, it vests a right in the transferee not merely to act in the place of the vendor and in his name, but substitutes him, in all respects, as the legal and only holder of the shares transferred to the same extent to which they were before held by the vendor. The title, therefore, by which such interest is held is strictly a legal title; it is created and defined by law; its benefits are secured by law; it is transferable by operation of law, and may be attached on mesne process and seized on execution and sold by legal authority to satisfy the debts of the owner."

The incidents of gifts inter vivos call for the observance of the rule as laid down by Chancellor Kent. Cogent reasons are given by Mr. Justice Gilbert in Johnson v. Spies, 5 Hun, 468, why the law might well overlook an informality or incompleteness in a gift causa mortis, which it would not tolerate in respect to a gift inter vivos. 15 Alb. L. J. 40.

A gift inter vivos must be complete in presenti; it has no reference to the future; there must be a delivery, and it must be an actual one, "so far as the subject is capable of delivery. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject." 2 Kent Com. *439.

In Basket v. Hassell, 107 U. S. 602, Mr. Justice Matthews (at p. 614) says: "The point which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and

to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in cases of a gift *mortis causa*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice."

As delivery is necessary to the validity of a gift *inter vivos*, and as the certificate of stock is the only thing connected with its ownership that is capable of manual tradition, it would seem that an assignment and power to transfer, which are necessary to make the certificate at once available, inheres in its effectual delivery.

There appears to be a controlling distinction between a transfer involving the delivery of a certificate of stock with an assignment and power to transfer the shares, with words of gift, and a delivery of the certificate unassigned and unaccompanied by an act or writing empowering its transfer; for a gift inter vivos being incomplete so long as any act of the donor remains undone which is necessary to confer on the donee the power of the present control and enjoyment of the subject of the gift, the failure of the record owner of the stock to clothe the donee with the means of at once acquiring the benefits of the stock, leaves unperformed an act which prevents the gift from taking effect in presenti which is vital to it as a gift inter vivos.

Again, it is necessary to the validity of a gift inter vivos that all of the title of the donor, whatever it may be, should be transferred at once to the donee. He cannot retain any interest therein without destroying its character as a gift. Young v. Young, 80 N. Y. 422.

The handing over of a certificate of stock without a written assignment or power certainly does not transfer the legal title. If we admit it confers an equitable title, the legal has remained in the donor, and cannot be enforced, for equity recognizes and makes effective only assignments founded on a valuable consideration and does not aid a volunteer. May Fraud. Conv. *406; Weale v. Ollive, 17 Beav. 252.

Nor under the decisions will equity build up a trust with the fragments of an incomplete gift. Antrobus v. Smith, 12 Ves. 39; Richards v. Dolbridge, L. R. (18 Eq. Cas.) 11; Moore v. Moore, L. R. (18 Eq. Cas.) 474; Milroy v. Lord, 4 DeG., F. & J. 274; Hertley v. Nicholson, L. R. (19 Eq. Cas.) 233; Young v. Young, supra.

In my judgment the character of the property in shares of a corporation, as well as the distinctive qualities of a gift *inter vivos*, forbid a departure from the rule, that a valid gift of such property cannot be made by the delivery of the certificate of stock, without formal transfer, or an assignment and power in writing to transfer the shares.

But, independent of the legal question, the rule that the possession of the certificate assigned or accompanied by authority to transfer is evidence of ownership, is now the recognized law of all mercantile communities in this country, and under it all transactions in the sale or pledge of stocks are carried on. The usage is so universal that the trans-

fers are printed on the certificates, as on the one in question. If the decisions in this state did not seem to require an assignment in writing, I would be satisfied that the failure of Henry Matthews to execute the transfer and power of attorney on the back of the certificate, was conclusive evidence that he did not intend to make a present gift of the stock, and to divest himself of all control and dominion over it or its proceeds. There was no haste in the matter; he had taken the time to execute the deed to John Matthews with all formality; he, it must be assumed, knew that the company would require his assignment in writing to transfer the stock, and notwithstanding anything he may have said indicating an intention to give it, the fact of his not making the paper effective shows that he intended to retain some dominion over the property. If so, it is fatal to the transaction as a gift inter vivos. The stock of the Camden and Amboy railroad I am of opinion was not effectually given by the intestate, and belonged at his death to his estate.

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EAST BIRMINGHAM LAND CO. v. DENNIS.

1888. 85 Alabama, 565.1

APPEAL from the City Court of Birmingham, in equity. Heard before the Hon. H. A. Sharpe.

The bill in this case was filed on the 13th April, 1888, by J. F. Dennis, against J. P. Mudd, and the East Birmingham Land Company, a private corporation; and sought to compel the transfer, on the books of the corporation, of a certificate for ten shares of stock, of which the complainant claimed to be the owner, and to compel the delivery of the certificate to him by said Mudd, who had possession of it under claim of ownership. The certificate was issued in the name of A. R. Dearborn, and was indorsed by him in blank. The complainant claimed that he had bought the certificate, with the blank indorsement thereon, from a holder who had acquired it by purchase from said Dearborn; and that it was lost by him, or stolen from him, without fault on his part. Mudd purchased the certificate, for full value, from Wilson, Sage & Clark, stock-brokers in Birmingham; and while denying complainant's ownership, claimed that he acquired a good title by the custom and usage of brokers and merchants in Birmingham. A decree pro confesso was taken against the corporation. On final hearing, on pleadings and proof, the court rendered a decree for the complainant; and this decree is now assigned as error, by each of the defendants separately.

S. D. Weakley, for appellants.

W. R. Houghton, contra.

¹ Citations of counsel omitted. — ED.

Somerville, J. We concur in the conclusion reached by the judge of the City Court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen-from his possession, without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it, some time in March, 1888.

The only question is, whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant.

The established rule is that no person can ordinarily be deprived of his ownership of property save by his own consent, or his negligence. The only exception to this rule is the case of a bona fide purchaser for value, of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It can not be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence, or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking-house, whence it was abstracted by some unknown person, apparently, without any fault on his part.

Nor does any question arise involving the rights of a subsequent bona fide purchase of stock, from one shown to be owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to bona fide creditors, or purchasers without notice."—Code 1886 § 1671; Fisher v. Jones, 82 Ala. 117. If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant Dennis himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title. Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper.

The rule is well settled, that a bona fide purchaser of a negotiable bill, bond or note, although he buys from a thief, acquires a good title, if he pays value for it without notice of the infirmity of his vendor's title. The authorities are clear in support of the view, that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper, and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the

absence of all negligence on the part of the owner, or his authority to make the sale. This question arose, and was decided by the New York Court of Appeals, in Mechanics' Bank v. New York & New Haven R. R. Co., 13 N. Y. (1856), 599. It was there held, that such a certificate does not partake of the character of a negotiable instrument, and that a bona fide assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or order of the party to whom they are given." They were said to be, in some respects, like a bill of lading, or warehouse receipt, being "the representative of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is, that all such instruments possess a sort of quasi negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In Shaw v. Spencer, 100 Mass. 382; s. c., 97 Amer. Dec., 1 Amer. Rep. 115 (1868), it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name, must fill out the blanks, . . so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of Sewall v. Boston Water Power Co., 4 Allen, 282; s. c., 81 Amer. Dec. 701, decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in *Barstow v. Savage Mining Co.*, 64 Cal. 388; s. c., 49 Amer. Rep. 705, where it was expressly held that a *bona fide* purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact, that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in regard to the matter of negligence, as follows: "But, if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading, in Gurney v. Behrend, 3 Ellis & Bl. 622, decided by the English Queen's Bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The

correspondent, without authority, fraudulently transferred the bill for value; and it was held by Lord Campbell, that for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of Barstow v. Savage Mining Co., supra, is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it. — Woolley v. Sargeant, 14 Amer. Dec., Note, on page 427, and cases there cited; Cook on Stock and Stockholders, sec. 368, 437, 192, 7, 10; 2 Daniel's Neg. Instr. (3d Ed.), § 1708g. It harmonizes entirely with the declaration of our statute, that shares of stock in private corporations "are personal property, transferrable on the books of the corporation" in accordance with the rules and regulation of the corporation. — Code 1886, § 1669; Campbell v. Woodstock Iron Co., 83 Ala. 451.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustee, to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases, it has often been held that the true owner, having conferred on the holder, by contract, all the external indicia of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." - 2 Dan. Neg. Inst. (3d Ed.), § 1708g; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Mount Holly Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Prall v. Tilt, 28 Ib., 479: Merchant's Nat. Bank v. Livingston, 74 N. Y. 223. These cases rest on the principle, that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver, than a stranger who has been negligent in trusting no one."— Allen v. Maury & Co., 66 Ala. 10.

It being an established principle of law, that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock-brokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract. Dickinson v. Gay, 83 Amer. Dec. 656, and note, 664; E. T., Va. & Ga. R. R. Co. v. Johnston, 75 Ala. 576; Lehman v. Marshall, 47 Ala. 362.

The decree of the court below is in accordance with these views, and must be affirmed.

McNEIL v. TENTH NATIONAL BANK.

1871. 46 New York, 325,1

APPEAL from a judgment of the General Term in the fourth district, and a judgment entered in Montgomery county, in favor of the plaintiff on the report of a referee.

The action was brought, to compel the surrender to the plaintiff of 134 shares of the capital stock of the First National Bank of St. Johnsville, which had been acquired by the appellant in the following manner:

In November, 1866, the plaintiff then being the owner of the shares in question, had an account with Goodyear Brothers & Durant, of the city of New York, stock brokers, relating to other stocks, which they had purchased and were carrying for him. For the purpose of securing any balance which might become due them on that account, the plaintiff delivered to and left with them, the certificate of the 134 shares in dispute, with a blank assignment, and power of attorney to transfer indorsed thereon, signed by the plaintiff, in the following words:

For value received, the undersigned hereby assigns and transfers unto . . . shares of the capital stock of the First National Bank of St. Johnsville, and do hereby constitute and appoint . . . true and lawful attorney, irrevocable for . . . and in . . . name and behalf, to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said bank.

In witness whereof, I have hereunto set my hand and seal, this ——day of ——.

(Signed.)

B. McNEIL.

Sealed and sworn in presence of —.

On the 18th of June, 1868, at the city of New York, the appellant at the request of Goodyear Brothers & Durant, paid the sum of \$45,135 to Fred. Butterfield, Jacobs & Co., receiving from them certain securities, including the certificate and power for the 134 shares in question, which had been previously pledged by Goodyear Brothers & Durant to Fred. Butterfield, Jacobs & Co.

Goodyear Brothers & Co. were at that time insolvent, and indebted to the appellant. In pledging the plaintiff's shares, they had acted without actual authority from him, and without his knowledge. He was indebted to them, on the account for which the shares were pledged to them, in the sum of \$3,000 with interest from December 1, 1866; but the account had not been rendered, or any demand made.

The appellant, at the time of receiving the shares, had no knowledge of the plaintiff's interest therein.

¹ Arguments and part of opinion omitted. - ED.

The cashier of the appellant, within a few days after receiving the certificate, assignment and power, filled in the blank in the assignment and power with "I. H. Stout, cashier, Tenth National Bank, New York, one hundred and thirty-four," and dated the same the 19th day of June, 1868, and sent the scrip to the First National Bank of St. Johnsville, for the purpose of having the shares transferred on the books accordingly; but such transfer was prevented by an order of injunction in this action.

The plaintiff demanded of the appellant a surrender of the scrip, on payment of the balance due by him to Goodyear Brothers & Durant; which demand was refused.

The value of the shares was \$17,420. The balance of the advance made by the appellant thereon (\$45,135, less the proceeds of the other securities received therewith, \$29,915.19), was \$15,219.81, besides interest.

When the certificate and power came to the possession of the appellant, they bore the proper revenue stamp, duly cancelled with the stamp of Goodyear Brothers & Durant, and the name of Ch. Goodyear as subscribing witness to the power. The referee found, that when the plaintiff delivered them, they were not stamped or witnessed, and that the plaintiff had never authorized those acts.

The referee found in favor of the plaintiff, and in conformity with his report, a judgment was entered, requiring a surrender of the scrip to the plaintiff, on payment by him of the \$3,000 and interest due by him to Goodyear Brothers & Durant.

This judgment was affirmed at General Term, and an appeal taken to the late Court of Appeals, where, after argument, that court was divided and a re-argument ordered. The case now comes up on the re-argument.

E. L. Fancher, for appellant.

S. Hand, for respondent.

RAPALLO, J. The pledge of the plaintiff's shares by his brokers, for a larger sum than the amount of their lien thereon, was a clear violation of their duty, and excess of their actual power. And if the effect of the transaction was merely to transfer to the appellant, through Fred. Butterfield, Jacobs & Co., the title or interest of Goodyear Brothers & Durant in the shares, the judgment appealed from was right.

It must be conceded, that as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend

upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance. (Pickering v. Busk, 15 East, 38; Gregg v. Wells, 10 Adol. & El., 90; Saltus v. Everett, 20 Wend., 268, 284; Mowrey v. Walsh, 8 Cow., 238; Root v. French, 13 Wend. 570.)

The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over the shares in question, as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers.

Simply intrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. (Ballard v. Burgett, 40 N. Y. R. 314.) "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title." Per Denio, J. in Covill v. Hill (4 Den., 323).

But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised, are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle, from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power.

In the present case, the plaintiff delivered to and left with his brokers, the certificate of the shares, having indorsed thereon the form of an assignment, expressed to be made "for value received," and an irrevocable power to make all necessary transfers. The name of the transferee and attorney, and the date, were left blank. This document was signed by the plaintiff, and its effect must be now considered.

It is said in some English cases, that blank assignments of shares in corporations are irregular and invalid; but that opinion is expressed in cases where the shares could only be transferred by deed under seal, duly attested, and is placed upon the ground that a deed cannot be executed in blank.

Without referring to the American doctrine on that subject, it is sufficient to say that no such formality was requisite in this case. It was

only necessary to a valid transfer as between the parties, that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignments and power, has been repeatedly shown and sanctioned in cases which have come before our courts. Such was established to be the common practice in the city of New York, in the case of the New York and New Haven Railroad Company v. Schuyler (34 N. Y., 41), and the rights of parties claiming under such instruments were fully recognized in that case. And in the case of Kortright v. The Commercial Bank of Buffalo (20 Wend., 91, and 22 Wend., 348), the same usage was established as existing in New York and other States, and it was expressly held that even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and that a party to whom it is delivered is authorized to fill it up, by writing a transfer and power of attorney over the signature.

It has also been settled, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. (Angell and Ames on Corporations, 8th ed., § 354; Bank of Utica v. Smalley, 2 Cow., 770; Gilbert v. Manchester Co., 11 Wend., 627; Kortright v. Com. Bank of Buffalo, 22 Wend., 362; N. Y. and N. H. R. R. Co. v. Schuyler, 34 N. Y., 80.)

In the case of Kortright v. Com. Bank, Chancellor Walworth, in a dissenting opinion, strenuously maintained, in conformity with his previous decision in Stebbins v. Phænix Ins. Co. (3 Paige, 356), that by a transfer not on the books, the transferee acquired only an equitable right to or lien on the shares; and that, having but an equitable right or lien, he took subject to all prior equities which existed in favor of any other person from whom such assignment was obtained. (22 Wend., 352, 353, 355.) But his view was overruled by the majority of the court. The action was at law in assumpsit, brought by the holder of the certificate and power, for a refusal to permit him to make a transfer on the books, and the question of his legal title was necessarily involved in the case. The judgment therein must therefore be regarded as a direct adjudication that, as between the parties, the legal title to the shares will pass by delivery of the certificate and power (See 20 Wend., 362.)

This was reasserted in this court in the New Haven Railroad Case (34 N. Y., 80), notwithstanding what was said in the Mechanics' Bank Case (13 id., 625).

By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a bona fide purchaser (34 N. Y., 80); but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation, for allowing such a transfer in violation of his rights. (Id.) He also takes the risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete.

The holder of such a certificate and power, possesses all the external *indicia* of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title, and the means of transferring such title in the most effectual manner.

Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy toward persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims, as against them, that he could not be deprived of his property without his consent, cannot he be truly answered that, by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact "substituted his trust in the honesty of his brokers, for the control which the law gave him over his own property," and that the consequences of a betrayal of that trust, should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?

These principles, in substance, were applied in the case of Kortright v. The Commercial Bank. But it is sought to distinguish that case from this; and it is argued, that there the certificate was intrusted to an agent, with authority from his principal to borrow money upon it for the benefit of his principal, and that he simply exceeded his authority by borrowing more than he was authorized to borrow, and absconding with the excess.

[After commenting on Kortright v. Bank.]

The principles of agency are, however, applicable to this case. In disposing of a pledge, the pledgee acts under a power from the pledge.

The distinction between a lien and a pledge is said to be, that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded. (Story on Bailments, 7th ed., § 311, note 2; Wasson v. Smith, 2 B. & Ald., 439.) The pledgee in selling, is bound to protect the interests of the pledgor, and as to the surplus, represents the pledgor exclusively. Now, for what purpose was the apparent ownership and power of disposition of this stock vested in the brokers? Surely for the purpose of enabling them, effectually and summarily, to execute this power under certain conditions. If the power was absolute on its face, or if the whole legal title was by the instrument apparently vested in the pledgee, and the condition was secret, wherein does the case differ in principle from one of ordinary agency.

I am at a loss to conceive on what principle it can be claimed, that an apparent naked authority is more effectual to bind the party giving

it, than an apparent ownership as well as authority.

I have reviewed the authorities at much more length than usual, by reason of the difference of opinion expressed in the late Court of Appeals in this case, and for the purpose of meeting the positions so ably maintained in the opinions, in favor of the respondent, delivered in the court below, and in the late court, on the former hearing.

My conclusion is, that the Tenth National Bank must, on the facts found, be deemed to have advanced bona fide on the credit of the shares, and of the assignment and power executed by the plaintiff, and is entitled to hold the stock for the full amount so advanced, and remaining unpaid after exhausting the other securities received for the same advance.

The points relative to the stamp and subscribing witness were fully answered in the opinions delivered on the first argument, and do not appear to have been the subject of dissent. I do not deem it necessary again to discuss them here.

The judgment of the General Term, and that entered on the report of the referee, should be modified, so as to allow the plaintiff to redeem, on payment of the balance due to the Tenth National Bank, on its advance of June 19th, 1868, and the costs of the action.

All concur except Allen and Folger, JJ, not voting.

Judgment modified

SIMON J. O'HERRON v. GRAY. NORA L. O'HERRON v. SAME.

1897. 168 Massachusetts, 573.

Two bills in equity, filed November 21, 1894, to compel the defendants to transfer and deliver to the plaintiffs certain certificates of the capital stock of the Boston and Albany Railroad Company.

The cases were heard in this court on an agreed statement of facts, the material portions of which appear in the opinion, and a decree was entered in favor of each plaintiff, requiring the defendants to transfer and deliver to them a certificate for thirty-one and twelve shares, respectively, of the capital stock of the Boston and Albany Railroad Company, and to pay to them the amount of the dividends received by the defendants upon such stock. The defendants, in each case, appealed.

The ease was argued at the bar in January, 1897, and afterwards was submitted on briefs to all the justices.

H. S. Dewey, for the defendants.

R. Foster, for the plaintiffs.

Knowlton, J. Each of the plaintiffs is the owner of stock in the Boston and Albany Railroad Company, represented by certificates in the possession of Gray, Dewey, and Company, the defendants. The plaintiff in the first case owned two certificates, - one for nineteen shares, and one for twelve shares, - both of which passed into the hands of the defendants, and were surrendered by them in exchange for a new certificate for thirty-one shares, issued in their own names. The plaintiff in the second case is the owner of one certificate for twelve shares, which the defendants received, and which has not been surrendered. Both of the plaintiffs are minors, and their respective certificates were made in their own names. These certificates were deposited for safekeeping by their mother, who was their guardian, in the Pittsfield National Bank. While the certificates were in the bank, the guardian borrowed money from the bank for her personal use, for which she gave her notes, and at the same time signed upon the back of each of her son's certificates a blank form of transfer, with a signature as follows: "Simon John O'Herron, by Mrs. Catherine O'Herron, Guardian." In like manner on her daughter's certificate, she signed with the signature, "Nora L. O'Herron, by Mrs. Catherine O'Herron, Guardian," and left the certificates as collateral security for the payment of her notes. This transaction occurred on or about December 17, 1889. On or about December 20, 1889, the cashier of the bank, one Francis, who had access to the vault where these certificates were kept, took them, without authority from anybody, and delivered them to the defendants, as security for one of his personal debts. In May, 1890, the guardian paid her notes at the bank.

Some time in the year 1891, the defendants took the two certificates standing in the name of Simon John O'Herron to the office of the Boston and Albany Railroad Company, and asked to transfer the stock, and have a new certificate issued in their own names. The corporation refused to permit a transfer of the stock or the issue of new certificates without a decree of the Probate Court authorizing the sale of the stock. Thereupon the defendants requested Francis to procure He then had a petition prepared by the registrar of the Probate Court for the county of Berkshire, in the name of the guardian, praying for leave to sell and transfer the certificates, and he signed the petition as follows: "Catherine O'Herron, Guardian, by E. S. Francis." On this petition, on July 21, 1891, the Probate Court issued a decree in the usual form, authorizing the guardian to sell or transfer the whole or any part of the stock. All this was done without notice of the petition by publication or otherwise, either to the plaintiffs or to their guardian, and without the knowledge of either of them. The transfer of the stock was then made on the books of the Boston and Albany Railroad Company, and a new certificate for thirtyone shares issued to the defendants. Francis continued to act as cashier of the bank until his death by suicide, on or about July 27, 1893, when his fraudulent conduct was discovered, and his estate was found to be insolvent. He paid the dividends on the stock to the plaintiffs' guardian regularly as long as he lived. At the time of receiving the certificates the defendants supposed that Francis was rightfully in possession of them, and they had no notice of his want of authority to pledge them, except the form of the certificates and of the transfers. The question is whether the defendants acquired a · good title to the stock as against the plaintiffs. It is not necessary to consider the original claim of the bank to the stock as security for the loans to the guardian, as the loans were paid. It is clear that the guardian had no right to pledge the stock, and we do not intimate that the bank acquired a valid title to it.

Francis, under whom the defendants derived their title, had no right to the certificates, but held them feloniously. They were the general property of the plaintiffs, and the special property of the bank, which had the possession of them as bailee. The act of Francis in taking them, and pledging them as his own, if not larceny at common law, was at least embezzlement, which by our statute is deemed to be larceny. Pub. Sts. c. 203, §§ 37, 41. A bona fide purchaser for value from one who has taken property in such a way, acquires no title to it. The only exception to this rule is when the property consists of negotiable securities. Heckle v. Lurvey, 101 Mass. 344, 345. Spooner v. Holmes, 102 Mass. 503, 507. But certificates of stock, even when indorsed in blank for the purpose of authorizing the making of an instrument of transfer over the signature, are not negotiable securities. This is settled by the highest authority. Shaw v. Spencer, 100 Mass. 382, 388. Shaw v. Railroad Co., 101 U. S. 557, 565,

566. Knox v. Eden Musée American Co., 148 N. Y. 441. Bangor Electric Light & Power Co. v. Robinson, 52 Fed. Rep. 520. London & County Banking Co. v. London & River Plate Bank, 20 Q. B. D. 232. It is plain, therefore, that the defendants cannot maintain their claim on the ground that the nature of the property takes it out of the general rule that no title can be acquired from one who has no title.

It is contended that St. 1884, c. 229, is applicable to these cases. If we assume in favor of the defendants that this statute will protect a bona fide purchaser or pledgee for value, to whom a certificate of stock has been delivered with a written transfer of it, or a written power of attorney to sell, assign, or transfer it, signed by the owner, it does not help the defendants. The signature on the back of these certificates was not that of the owner, but of a guardian whose trust relation to the property was disclosed on the face of the papers. In their report on the revision of the statutes (1834), the commissioners say, in a note to chapter 79, § 22 (which is section 21 in the final enactment), that they have made the provision as to sales of property by guardians the same as that for trustees appointed under wills. The provision for trustees under wills is found in Rev. Sts. c. 69, § 11, in Gen. Sts. c. 100, § 14, and with certain broader provisions from more recent legislation in Pub. Sts. c. 141, § 20. The provision in regard to guardians is found in Gen. Sts. c. 109, § 22. As a part of the history of the legislation, see also St. 1817, c. 190, § 35, and St. 1820, c. 54, § 3. It is the duty of one purchasing property held by a trustee to ascertain whether the transaction appears to be within the trustee's authority. Atkinson v. Atkinson, 8 Allen, 15. Shaw v. Spencer, 100 Mass. 382. Loring v. Salisbury Mills, 125 Mass. 138. Smith v. Burgess, 133 Mass. 511. Loring v. Brodie, 134 Mass. 453. Colonial Bank v. Cady, 15 App. Cas. 267. Duncan v. Jaudon, 15 Wall. 165. The statute does not protect the purchaser in a case like the present.

It is contended, further, that the plaintiffs are estopped from reclaiming their property by the negligence of their guardian in leaving their certificates at the bank, indorsed with her signature. The principle which the defendants invoke is not applicable to the facts. Negligence which will work an estoppel of this kind must be a proximate cause of the purchase or advancement of money by the holder of the property, and must enter into the transaction itself. Swan v. North British Australasian Co., 7 H. & N. 603; S. C. 2 H. & C. 175. Colonial Bank v. Cady, 15 App. Cas. 267, 282. Baxendale v. Bernett, 3 Q. B. D. 525, 530. Picker v. London & County Banking Co. 18 Q. B. D. 515. Knox v. Eden Musée American Co., 148 N. Y. 441. Arnold v. Cheque Bank, 1 C. P. D. 578, 587, 588. Scholfield v. Londesborough, [1895] 1 Q. B. 536; S. C. [1896] App. Cas. 514. Telegraph Co. v. Davenport, 97 U. S. 369. Bangor Electric Light & Power Co. v. Robinson, 52 Fed. Rep. 520. If the negligence is such as might be an appropriate foundation for an action at law to recover damages by one who advances his money, it may be availed of by way of estoppel, to avoid circuity of action. But the facts of this case fall short of showing such negligence. The guardian intrusted the certificates to a national bank of good reputation. Neither she nor anybody else had any reason to anticipate larceny or embezzlement of the property, and a fraudulent use of it, to deceive others, by a trusted officer of the bank. She had no reason to expect that, if the certificates were stolen, anybody would take them without inquiring whether, as trust property, they had been disposed of by the guardian for the benefit of her wards. The conduct of the guardian was not a cause, but a mere condition, of the defendants' advance of money upon the faith of the certificates. A criminal act of Francis intervened as the cause of the defendants' loss, and this the guardian had no reason to anticipate.

When the certificates of stock came into the hands of the defendants, they showed on their face that they had not been assigned or transferred by their owners, but only by one who stood in a relation of trust to the owners. The transfer had not been completed, and the stock still stood in the names of the plaintiffs on the books of the corporation. There was only a signature of the guardian upon each certificate, appended to a blank which contained nothing to show the nature of the transaction by which it came into the hands of Francis. There was nothing to indicate that the plaintiffs had received value for the stock. Francis, who presented the certificates, was using them solely for his personal benefit. On the face of the paper there was notice to the defendants that they were trust property while in the hands of the guardian. The defendants were put upon inquiry, and they had no right to receive them as a pledge for Francis's debt, without at least having information of facts which would warrant them in believing that the plaintiffs' interests had been protected in the transaction by which they came into the hands of Francis. Apparently they made no inquiry, but took them as they were, knowing that the plaintiffs were to receive nothing from the disposition which Francis then made of them. We are of opinion that there is no principle of estoppel that can be invoked in favor of the defendants to deprive the plaintiffs of their property.

The decree of the Probate Court does not give effect to the claim of the defendants. It was not made until long after the transfer to them. It purported to authorize a sale of the stock, and not a pledge of it, much less a pledge of it for the benefit of others than the plaintiffs. But, above all, the Probate Court acquired no jurisdiction of the case as against the plaintiffs. No case nor any proper party was ever before the court in regard to the sale of the stock. The unauthorized signature and appearance of Francis availed nothing as against the plaintiffs or their guardian. Jochumsen v. Suffolk Savings Bank,

3 Allen, 87. Scott v. McNeal, 154 U. S. 34, 46.

Decree in each case affirmed.¹

¹ A stockholder agreed to sell his shares, and deposited with the corporation his cen-

IN RE BAHIA AND SAN FRANCISCO R. CO.

1868. Law Reports, 3 Queen's Bench, 584.

On the 11th of May, 1867, it was ordered by rule of court, under 25 & 26 Vict. c. 89, s. 35, that the name of Amelia Trittin be re-

tificates with a blank indorsement signed by him. New certificates were issued in their stead to the purchaser. It was the duty of the manager of the corporation to cancel the old certificates. Instead of doing so, he delivered them to Knox as security for a loan. Held, that the corporation was not estopped to deny the validity of the old certificates, and that Knox could not recover of the corporation the damages sustained by him by reason of his loaning money on the faith of the certificates. Knox v. Eden Musée &c. Co., A. D. 1896, 148 N. Y. 441.— Ed.

¹ The 25 & 26 Vict. c. 89 applies (s. 176) with certain exceptions to companies formed and registered under the Joint Stock Companies Acts of 1856 and 1857.

Section 25: — Every company under this act shall cause to be kept in one or more books a register of its members; and there shall be entered therein the following particulars: (1) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number; and of the amount paid or agreed to be considered as paid on the shares of each member. (2) The date at which the name of any person was entered in the register as a member. (3) The date at which any person ceased to be a member. And any company acting in contravention of this section, shall incur a penalty not exceeding 51 for every day during which its default in not complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention, shall incur the like penalty."

Section 31:— "A certificate, under the common seal of the company, specifying any share or shares, or stock held by any member of a company, shall be primâ facie evi dence of the title of the member to the share or shares or stock therein specified.

By s. 32, the register is to be open to the inspection of a member gratis, and of stranger on payment of 1s.

Section 35:—"If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may as respects companies registered in England or Ireland, by motion in any of her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the court of session, or in such other manner as the said courts may direct, apply for an order of the court that her register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party

stored to the register of the Bahia and San Francisco Railway Company in respect of the five shares in the company numbered 84,511 to 84,515 both inclusive, and that the company do pay to Amelia Trittin any dividends that have fallen due since the shares were transferred from her name. And it was further ordered that a special case be stated for the opinion of this Court between the Reverend Richard Burton and Mary Anne Goodburn and the company, for the purpose of determining the amount of damages (if any) which the company are liable to pay them respectively.

- 1. On the 8th of March, 1866, Miss Amelia Trittin was the registered holder of five shares in the Bahia and San Francisco Railway Company, Limited, hereafter called "the company," and deposited the certificates of the shares with one Thomas Charles Oldham, a stock-broker, and requested him to keep the same and to receive the dividends payable thereon.
- 2. On or about the 17th of April, 1866, a transfer of the five shares to John Alfred Stocken and Samuel Goldner, purporting to be executed by Amelia Trittin, but which for the purpose of this case is admitted to have been a forgery, was left with the secretary of the company for registration, together with the certificates of the shares.
- 3. The secretary of the company, in the ordinary course of business, then sent by post to the last place of residence of Miss Trittin a written notice that the deed of transfer had been so received by him, and after ten days having received no answer from her, registered the deed of transfer and removed the name of Miss Trittin from and placed the names of John Alfred Stocken and Samuel Goldner upon the register of shareholders as holders of the aforesaid five shares, and share certificates in respect of the said shares were handed to them.
- 4. In May, 1866, the Reverend Richard Burton through his broker bought on the Stock Exchange four shares in the company, and Mrs. Mary Anne Goodburn by her broker bought one share.
- 5. About the same time, John Alfred Stocken and Samuel Goldner sold five shares in the company to Arthur Bristowe, a stockbroker, and in pursuance of the above contracts transferred four of the shares comprised in the forged transfer to Mr. Burton, and the remaining one to Mrs. Goodburn.

aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal in the manner directed by 'the Common Law Procedure Act, 1854,' shall lie."

Section 37: — "The register of members shall be prima facie evidence of any matters by this act directed or authorized to be inserted therein."

- 6. It is admitted that Mr. Burton and Mrs. Goodburn entered into the contracts above-mentioned bonå fide and for value of the shares, without notice of any fraud, and according to the usual course of business with reference to the purchase of shares, and on or shortly after the 28th of May, 1866, they were duly registered by the company as the holders of the shares, and share certificates in respect thereof were handed to them.
- 6a. In the above transactions everything was done by the company in accordance with the usual custom of business, and there was nothing in the circumstances so far as they were known to the company to excite their suspicion or to induce them to depart from such usual course of business.
 - 7. The form of certificate used by the company was:—
 Certificate of Shares.

Bahia and San Francisco Railway Company, Limited. Registered under the Joint Stock Companies Act of 1856.

28th January, 1858.

Nos. to . Five shares of 20*l*. each.

This is to certify that is the registered holder of the shares Nos. to in the above company, subject to the articles of association, on each of which there has been paid to this day three pounds.

Given under the common seal of the company, Signed by two directors. the day of 18

8. The articles of association were made part of the case. By art. 1, the regulations of table B. of the Joint Stock Companies Act, 1856, were excluded, except as expressly set forth in the articles themselves, By art. 25, the board shall determine the mode and conditions of, and the charges for the transfer of shares, but no such charge shall exceed 2s. 6d. for every transferor named in the instrument of transfer. By art. 26, every original shareholder shall, on payment of such sum, not exceeding 2s. 6d., as the directors prescribe, be entitled to a certificate under the common seal of the company, and under the hands of two of the directors, specifying the shares held by him, and the amount paid up in respect thereof.

The questions for the opinion of the Court were: 1. Whether, as against the company, Mr. Burton and Mrs. Goodburn are entitled to the said shares in the company, or an equivalent number. 2. Whether they are entitled to any and what damages to be paid to them by the company under the above circumstances.

The Court were to make such order and give such judgment as they might think fit, and have power to make and give.

J. Brown, Q. C. (W. G. Harrison with him), for the claimants, Burton and Goodburn.

[Argument omitted.]

Watkin Williams (Cohen with him), for the company. The contract which a buyer makes in the market is only for a certain number of shares, not any specific shares, and it is not till the purchase is complete that the company is called upon to act and register the transfer. There is, therefore, no contract on which the company can be held liable to the claimants. Nor is there any breach of duty shown on the part of the company; the secretary acted with due caution by notifying the proposed transfer to Miss Trittin, the person purporting to transfer, and the case states (par. 6a) that everything was done by the company in the usual course of business.

[BLACKBURN, J. — The company are bound by the statute to keep a correct register.]

Only to use due diligence in keeping it correct, not to have a register absolutely correct: see East Gloucestershire Railway Company v. Bartholomew, Law Rep. 3 Ex. 15.

[Blackburn, J. — That case does not touch the present case.

COCKBURN, C. J. — As far as the register is concerned, it does not appear that the claimants ever referred to the register.]

Then it is said that the company, having issued share certificates to Stocken and Goldner, as their credentials of membership, are estopped from denying their title. But the company never asserted they had title, but only that they were on the register as shareholders, which is true. The certificate is no representation to third persons, it is only a document between the holder and the company.

[Blackburn, J. — The statute (s. 31) makes the certificate expressly primâ facie evidence of the title of the holder.]

As between him and the company.

[Blackburn, J. — No, primâ facie evidence generally.]

In all the cases bearing on the subject, the company sought to be made liable had been guilty of negligence; as in Ashby v. Blackwell, 2 Eden 299, where the power of attorney was grossly irregular on the face of it. Hidyard v. South Sea Company and Keate, 2 P. Wms. 76, is the only case really in point. There, on a transfer of stock under a forged letter of attorney, the dividends and stock were ordered to be refunded and restored by the assignee to the right owner, and the company were held not responsible.

[Blackburn, J. — That was a case between the company, the purchaser under a forged letter of attorney, and the true owner; the rights of sub-purchasers had not to be considered.]

But surely the remedy is against the vendor, if the purchaser gets nothing, instead of what he contracted for. The company were not in fault; the claimants were not misled by the company, they made no inquiries, nor ever saw the register, as the Lord Chief Justice has pointed out.

[COCKBURN, C. J.—No; but by giving the certificate the company practically armed the vendors with the means of holding themselves out as the holders of these shares.

LUSH, J. — The question comes round to this, what does the certificate mean: does it certify only that A. B. is on the register, or does it not rather amount to certifying that he is in reality a shareholder?]

Only that he is on the register.

[Blackburn, J. — Can that be said in the face of s. 31?

Lush, J. — Suppose after the contract, but before he pays the purchase-money, the purchaser applies to the company to know if his vendor is a member of the company, and the answer is yes? The company would then have made a representation on which they intended the purchaser to act. How does that differ from issuing a certificate, which says the same thing?]

It differs in this: the company do not make a voluntary statement, they are bound to keep a register, and issue a certificate.

[Blackburn, J. — They are not bound to put a person on the register who is not rightfully entitled.]

But in order to make them liable for putting a person not entitled on the register negligence must be shown, which is, in effect, negatived in this case. In Swan v. North British Australasian Company, 2 H. & C. 175, 181, 188, 32 L. J. Ex. 276, 279, Cockburn, C. J., says, "To bring a case within the principle established by the decisions in Pickard v. Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), and Freeman v. Cooke, 2 Ex. 654, 18 L. J. Ex. 114, it is, in my opinion, essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered." And in the same case, Blackburn, J., says, "I agree that a party may be precluded from denying against another the existence of a particular state of things, but then, I think, it must be by conduct on the part of that party such as to come within the limit so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in Freeman v. Cooke, 2 Ex. 663, 659, 18 L. J. Ex. 119, 117. It is pointed out by Parke, B., in the course of the argument in that case, that in the majority of cases in which an estoppel exists, 'the party must have induced the other so to alter his position that the former would be responsible to him in an action for it.' And he had before pointed out that 'negligence,' to have the effect of estopping the party, must be 'neglect of some duty cast upon the person who is guilty of it.' And this, I apprehend, is a true and sound principle."

COCKBURN, C. J. — I am of opinion that our judgment must be for the claimants. If the facts are rightly understood, the case falls within the principle of Pickard v. Sears and Freeman v. Cooke. The company are bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market,

and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and. transfer of shares. It is stated in this case that the claimants acted bonâ fide, and did all that is required of purchasers of shares; they paid the value of the shares in money on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferors had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery. That brings the case within the principle of the decision in Pickard v. Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), as explained by the case of Freeman v. Cooke, 2 Ex. 654, 18 L. J. Ex. 114, that, if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.

The only remaining question is, what is the redress to which the claimants are entitled. In whatever form of action they might shape their claim, and there can be no doubt that an action is maintainable, the measure of damages would be the same. They are entitled to be placed in the same position as if the shares, which they purchased owing to the company's representation, had in fact been good shares, and had been transferred to them, and the company had refused to put them on the register, and the measure of damages would be the market price of the shares at that time; if no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares.

BLACKBURN, J.—I am of the same opinion. When joint stock companies were established, the great object was that the shares should be capable of being easily transferred; and the legislature has made provision by 25 & 26 Vict. c. 89, s. 25, that the company shall keep a register of the members, and when the capital is divided into shares, each share is to be distinguished by a number, and the shares held by each member is to be specified, and the dates at which each person's name was entered on the register. In order to keep up such a register, the company must alter its register whenever a transfer of shares is made, on the application and payment of a certain sum to them by the person to whom the shares are alleged to be transferred. And the first thing the company would have to do when a transfer was tendered to them, would be to inquire into its validity; but a company may be deceived and induced, as the company were in the present case, without any negligence, to receive as genuine a forged transfer. They accordingly

made an alteration in the register, and made it in fact inaccurate by putting the names of Stocken and Goldner on the register as the holders of particular shares, when in fact they were not so. The statute (s. 31) further provides that the company may give certificates, specifying the shares held by any member; and the object of this provision is expressly stated to be that this certificate should be prima facie evidence of the title of the person named to the shares specified; and the company, therefore, by granting the certificate, do make a statement that they have transferred the shares specified to the person to whom it is given, and that he is the holder of the shares. If they have been deceived and the statement is not perfectly true, they may not be guilty of negligence, but the company and no one else, have power to inquire into the matter; and it was the intention of the legislature that these certificates should be documents on which buyers might safely act. Now, on the facts of this case, although according to the practice on the stock exchange, the claimants did not originally contract for these particular shares, the money was paid by them or their broker on the execution by Stocken and Goldner of a transfer, and on the certificate under the seal of the company being handed over to them that Stocken and Goldner were the holders of these particular shares; and it is quite clear that a statement of a fact was made by the company, on which the company, at the very least, knew that persons wanting to purchase shares might And the claimants having bona fide acted upon that statement, and suffered damage, can they recover from the company? I think they can, on the principle enunciated in Freeman v. Cooke, 2 Ex. 654, 18 L. J. Ex. 114. Suppose an action by the claimants against the company, asserting that the shares were the plaintiffs' and that the company refused to pay them the dividends and deprived them of the use of the shares, in effect an action of trover. The only plea would be that the plaintiffs were not the true owners of the shares, and there would be a replication by way of estoppel, that the company were estopped from saying that the plaintiffs were not the owners, because they had purchased on a statement of title made by the company, and intended by them to be acted upon; this would clearly amount to an estoppel within the rule defined in Freeman v. Cooke, 2 Ex. 654, 18 L. J. Ex. 114. The claimants, therefore, would be entitled to a verdict, and it follows that they are entitled as damages to the value of the shares at the time they were converted; that is, at the time when Miss Trittin interfered and claimed the shares.

Mellor, J. — I am of the same opinion. I think the right of action cannot be grounded on negligence; but that the facts do amount to an estoppel on the company from denying the claimants' title. The company need not register a person as a member, under a transfer of shares of which they have any doubt; but can leave the transferee to come to the Court and make out his title. In the present case the company acted apparently without negligence, on the production of the transfer by the broker, and having sent a letter to Miss Trittin and received no

answer, they caused the transferees to be registered, and gave them a certificate under seal, clearly intending them to use it in the market as a voucher or statement that they were the holders of the particular shares. The claimants accordingly purchase the shares, but it turns out that they acquired no title, and their names are struck off the register. I cannot but think that a person must have a remedy against a company for wrongfully striking his name off the register, so as to prevent his having the advantage of the shares he had purchased, and in such an action by the claimants the estoppel would arise against the company. The measure of damages would be the value of the shares at the time they ceased to be recognized as shareholders. Whether or not the company may have a remedy over against Stocken and Goldner it is unnecessary to consider.

Lush, J. — I am also of the same opinion. It is not stated what the usual course of business is, but only that the shares were purchased in the usual course. I take it, the claimants having bargained in the share market for a certain number of shares each, they were offered a transfer of the shares which had been transferred by a forged transfer to Stocken and Goldner, the certificate at the same time being handed to them before the completion of the purchase, and by this certificate, in the usual form and under the seal of the company, it is certified that Stocken and Goldner are the registered holders of the specific shares, giving the numbers. Now there is no doubt that the certificate was given by the company to Stocken and Goldner in order that they might use it in the usual way in which such certificates are used, viz., as a voucher to a purchaser of their names being on the register. And the claimants having acted on this statement by the company, there arises an estoppel as against the company, prohibiting them from denying that what it states is true. And the question then is, what does the certificate mean? Does it mean merely, that Stocken and Goldner are on the register, and the company have done their best to ascertain that they are entitled to the shares, but cannot say whether they are so entitled? Or does it amount to a statement that the company take upon themselves the responsibility of asserting that they are the registered shareholders entitled to the specific shares? I think the certificate must amount to the latter assertion. It is the company who are to keep and look after the register, and they are the only persons who have control over it, and they can refuse to register a person until he shows that he is legally entitled. Having, therefore, put the names of Stocken and Goldner upon the register, and granted them a certificate, the company are estopped after that statement has been acted upon, and cannot deny that those persons were the legal holders of the particular shares which have been transferred to the claimants. claimants, therefore, are entitled to recover from the company the value of the shares at the time when they were deprived of them.

Brown, Q. C., asked that the Court would award interest in addition; fie stated that the company paid 7 per cent. dividend, and that the com

pany refused to recognize the claimants as shareholders on the 10th of October, 1866.

Per Curiam.—The rule will be that the company do pay to the claimants the value of their respective shares on the 10th of October, 1866, at interest from that time at 4 per cent., as damages, together with costs.

Rule absolute accordingly.

GEORGE WHITECHURCH, LIMITED, v. CAVANAGH.

Aug. 5, 1901. House of Lords, 17 Times Law Reports, 746.1

This was an appeal from an order of the Court of Appeal (Lords Justices A. L. Smith, Collins, and Romer) affirming a judgment for the plaintiff [Cavanagh] — respondent on the appeal — of Mr. Justice Bigham. The case below is reported, 16 The Times L. R. 303.

Mr. Lawson Walton, K. C., Mr. Swinfen Eady, K. C., and Mr. Wills appeared for the appellants; and Mr. Rufus Isaacs, K. C., and Mr. Ryland, for the respondent.

The facts are rather complicated, and are sufficiently stated in Lord Macnaghten's judgment. The question was whether a company was estopped for refusing to give effect to the representations of its secretary and of its managing director. The action was in effect for damages from the appellant company for refusing to place the respondent on its register of shareholders.

The House, having taken time for consideration, reversed the decision of the Court of Appeal, and held that the company was not bound by these representations.

LORD MACNAGHTEN'S judgment was read by the LORD CHANCEL-LOR, who expressed his concurrence therein. It was as follows: This case has been argued very fully and very ably. Many interesting points have been discussed, most of which, I am happy to think, are not at all necessary for the determination of the matter in hand. The real question may be stated very shortly. Has the appellant company, George Whitechurch (Limited), incurred any, and, if any, what, liability by reason of representations made by its secretary, Richard G. Wells, in London, and by its managing director, George Whitechurch, in Paris? The claim as originally presented was founded on an alleged misrepresentation by the company. action, however, was treated by the Court of Appeal and by the learned counsel for the respondent at your Lordships' Bar as an action to recover damages from the company for refusing to place the respondent Cavanagh upon its register of shareholders. It was held by the Court of Appeal, and it was strenuously argued at the Bar, that

¹ It is supposed that this case will be officially reported in Law Reports (1901), Appeal Cases. — ED.

the appellant company was estopped by the representations of Wells and Whitechurch from denying Cavanagh's right to be placed on the register. I quite agree with the Master of the Rolls in thinking that it is necessary to keep the two alleged estoppels distinct and to deal with them separately. Whatever difficulty there may be in ascertaining the precise scope and effect of the representations made by Whitechurch, there can be no doubt as to the scope and effect of the representations made by Wells. They are in writing and in a common form. There can be no question as to the meaning of the written words, except, perhaps, in regard to one point, which in the view I take of the case is not material. It seems that one Raymond had undertaken to transfer to Cavanagh by way of security a large number of shares in George Whitechurch (Limited) which were of considerable value. On May 29, 1899, at Raymond's bidding, Wells, the secretary of the company, certified two transfers, one of 1,100 preference shares and the other of 9,250 ordinary shares in the company. The shares were each £1 shares, fully paid, and worth about 15s. apiece. The transfers were executed by Raymond as transferor. They were intended to be executed by Cavanagh, who was named as transferee. The certification on the transfer of the preference shares was in these words: "Coupon for £1,100 preference shares in the company's office. George Whitechurch (Limited). — Richard G. Wells, Secretary." The certification on the transfer of the ordinary shares was in similar terms. It was common ground that the word "coupon" stood for "certificate" or "certificates," and it was not disputed that the certification was a representation that there had been lodged in the company's office certificates for the shares specified in the bodies of the transfers, such certificates being either in the name of Raymond himself, as registered owner, or in the names of the registered owners who had executed in favor of Raymond transfers which had been lodged with the certificates. In the present case the jury found that the certification given by Wells imported that the shares in question were standing in Raymond's own name. It was contended that this finding was not supported by the language of the certification, or by anything in the evidence. In my opinion the point is immaterial. It turned out that no certificates had been lodged in the company's office by Raymond, nor were any certificates ever forth coming to answer the transfers which Raymond had executed. far as Raymond was concerned the whole thing was a fraud. was Raymond's secretary and servant, as well as secretary to the company. He was Raymond's instrument in carrying out the fraud. lied purposely for Raymond's benefit. The jury have found that Wells joined in the fraud for the benefit of the company as well as for the benefit of Raymond. There is not, however, a shadow of evidence to support this conclusion. The finding, so far as the company is concerned, must be disregarded. It only shows how little the jury appreciated the facts of the case. Then comes the question,

Is the company bound by the representations of their secretary? That must depend upon what authority the secretary had or was held out as having. Now the duties of a company's secretary are well understood. They are of a limited and of a somewhat humble character. "A secretary," said Lord Usher, "is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all " (Barrett v. South London Tranways Company, 18 Q. B. D. 817). In the present case the secretary was not even in the pay of the company, at least not directly. The company, it seems, was provided with an office and a secretary too for £50 a year by another company which appears to have been under Raymond's control and management. No doubt the practice of certifying transfers is a convenient one. It facilitates dealing in shares on the Stock Exchange, and so tends indirectly to increase the value of shares as a marketable commodity. But in permitting its secretary to certify transfers, it cannot be supposed that a company authorizes the secretary to do more than to give a receipt for certificates which were actually lodged in the office. I cannot think that a company is estopped by the certification of its secretary if he gives a receipt or an acknowledgment for certificates which have not been lodged with him. If authority be wanted for this proposition it seems to me that there is ample authority to be found in the case of Grant v. Norway (10 C. B. 665). Grant v. Norway was a much stronger case than the present. There it was held that a shipowner is not bound by bills of lading signed by the master for goods not received on board. The court declared that it could not "discover any ground upon which a party taking a bill of lading by endorsement would be justified in assuming that" the master "had authority to sign such bills whether the goods were on board or not." Having regard to the authority which the master undoubtedly possesses, and the important part which bills of lading play in the commerce of the country, there was much to be said in favor of an opposite view. It was argued in Grant v. Norway that the doctrine for which the shipowner was contending would go far to destroy the negotiability of bills of lading, and that as the master had an unlimited authority to sign bills for goods received, and was for some purposes regarded as the general agent of the owner, it was but just that the owner should be responsible if the master exceeded his authority or deceived third persons. But, for all that, the principle of the decision was accepted in Coleman v. Riches (16 C. B. 104), and the decision itself has been recognized in this House as sound law; and the commerce of the country has not suffered, nor has the credit of bills of lading been impaired in consequence. There is a marked difference between a certificate and a certification. A certificate is under the seal of the company. By the Companies Act, 1862, a certificate is made prima facie evidence of title. If faith were not given to the solemn assertions of a company under its common seal, "it

would," as Lord Cairns observed in Burkinshaw v. Nicolls (3 App. Cas. 1004), "paralyse the whole of the dealings with shares in public companies." A certification stands on a different footing altogether. Transfers are never certified under the company's seal. There is no obligation on a company to certify transfers at all. The certification is not passed by the directors or brought before the board. A certification, in fact, is only required for a temporary purpose, to meet the exigencies of business on the Stock Exchange, which has stated days and fixed periods for the different stages of a business transaction intended to be carried out under its rules. In dealings in shares not under the rules of the Stock Exchange certification is really out of place. In such dealings, in the case of a purchase, the price would only be paid in exchange for the transfer and share certificate — on the completion of the transaction and not before. Still less would a certification be required if the shares were merely intended to form a security. A good equitable charge may be created by the deposit of certificates, and if the certificates happened to include shares which were not intended to be the subject of the security, there would be no very great difficulty in defining the extent of the proposed charge in the memorandum of deposit. It seems to me that it would be most unreasonable in any case, whether the transaction takes place on the Stock Exchange or not, to hold a company estopped by the certification of its secretary if the secretary certifies a transfer without having received the certificates. The supposed estoppel, therefore, founded on Wells's certification, in my opinion, fails altogether, and for the same reason the case founded on alleged misrepresentation by the company fails also.

I now come to the estoppel founded on representations made by George Whitechurch.

[His Lordship here stated the evidence, and continued.]

The jury found that George Whitechurch "allowed the plaintiff to think it was all right in order to induce the plaintiff to withdraw 'the opposition." It is not very clear what the jury really meant. The Master of the Rolls thinks they meant to say that Whitechurch represented that "the certified transfers were as good as transfers plus certificates." Lord Justice Collins held that the "jury meant that Whitechurch led Cavanagh to believe that nothing more was required by the company to entitle the plaintiff to receive a certificate giving him the right to be registered as the transferee of the shares." My Lords, I must confess I am utterly at a loss to see any ground upon which an estoppel can be raised against the company. To begin with, what authority had George Whitechurch to make any representation in regard to these certified transfers which could bind the company? He was no doubt the managing director. The commercial business of the company was entrusted to him. But nobody can suppose that this was commercial business. I put that aside. Then

I have always understood that a representation to bind anybody as an estoppel must be a representation of an existing fact, or rather a representation as to some fact alleged to be in existence and not to promises de futuro. What was it that Whitechurch represented as an existing fact? That Wells was the secretary of the company, and that the certification on the transfers were signed by him? Well, that was perfectly true. That Wells had actually received the necessary certificates? It is absurd to suppose that Whitechurch was asked to guarantee that. He had no reason to doubt Wells's honesty, and naturally took it for granted that Wells would not have given a receipt for that which he had not received. The Master of the Rolls seems to think that the representation attributed to Whitechurch was a representation to the effect that the company or the board of directors would act on the certified transfer without requiring anything more. That seems to be the view of Lord Justice Collins also. That is not a representation of an existing fact. If it is anything it is a promise de futuro, which cannot be an estoppel. The doctrine of estoppel by representation is a very old head of equity. It has been discussed not unfrequently in this House, notably in the case of Jorden v. Money (5 H. L. C. 185), to which Lord Selborne was constantly in the habit of referring. It is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavoring to reduce it to rules such as those which have been formulated in the case of Carr v. London and North Western Railway Company (L. R., 10 C. P. 307). Perhaps some of the difficulties which have gathered round the present case have come from clinging to rules rather than attending to principles.

[His Lordship added inter alia, that Cavanagh and his solicitor, who were both present at the interviews with Whitechurch, must be taken to have been cognizant of the articles of association of George Whitechurch, Limited, which deal with the transfer of shares in that company. Whether they were in fact acquainted with the regulations of the company or not, they must be taken to have had notice of them.]

The LORD CHANCELLOR said that Lord SHERROD concurred in the judgment proposed.

Lord James of Hereford, Lord Brampton, and Lord Robertson read judgments to the same effect.

Appeal allowed. Action dismissed.

NEW YORK AND NEW HAVEN R. R. CO. v. SCHUYLER.

1865. 34 New York, 30.1

This is an action in the nature of a suit in equity, against Robert Schuyler and several hundred other defendants. The complaint was sustained by this court on demurrer, as will appear by reference to the reported case in 17 N. Y. 592. The object of the complaint was to have a large number of alleged false and fraudulent certificates and transfers of pretended stock of the company, made by Schuyler, and charged to be held by the defendants, adjudged spurious and void; and to compel the certificates to be brought into court and cancelled; and to enjoin the several defendants from further prosecuting actions then pending, and from bringing suits against the company to enforce such certificates and transfers, or to recover damages for any reasons connected therewith.

A large number of the defendants answered, setting forth various facts and grounds upon which they claimed that the plaintiffs were not entitled to the relief sought, and that the certificates or transfers respectively held by them were, or ought to be, treated as valid and binding on the company; or damages awarded to them for injuries sustained by the alleged frauds of Schuyler, and many asking for relief by way of judgments for damages against the company.

The case was tried at Special Term before Ingraham, J. The court found various facts, some of which are hereinafter summarized. A judgment entered at the Special Term was affirmed at the General Term. From such affirmance the plaintiffs and some of the defendants appealed.

It appeared that, from 1847 to 1854, the issue of certificates, both for entirely new stock and for stock reissued upon transfers, was left wholly in charge of Robert Schuyler, the transfer agent of the company.

The charter provided that the shares should be transferred in such manner as the by-laws should direct. By-laws were adopted, according to which shares were transferable only on the books of the company by the shareholder or his attorney duly appointed, and on the surrender of the certificate held by him when any certificate had been issued. Each certificate issued recited that the person named therein was entitled to shares transferable on the books of the company by such person, or his attorney, on the surrender of this certificate. Schuyler, as transfer agent, was authorized to sign and issue certificates on a transfer from one shareholder to another upon the books and on the surrender of the previous certificates. He also had authority to issue certificates in precisely the same form to the original subscribers for the stock (there was a large increase in the capital stock in 1851, in conformity with a

¹ The greater part of the case is omitted. - ED.

provision of the charter). He also had authority to dispose of the stock of the company not taken by the original subscribers (of which there was a large amount), and issue certificates in the same form to the purchasers. He also had authority to dispose of certain forfeited shares, and in such case issue like certificates. He also had authority to receive transfer to himself of shares on behalf of the company, and transfer the same to purchasers and issue like certificates to them.

From 1848 to 1854, Schuyler fraudulently issued stock in excess of the amount limited by the charter. There were over-issues of what purported to be the original stock. There was also "over-issue by transfer," Schuyler issuing new certificates for shares of already existing stock in cases where the previously issued certificates had not been surrendered but were still outstanding. In many cases where valid certificates of stock had been issued to R. & G. L. Schuyler for stock actually belonging to them, and outstanding to their credit on the books at the time, and while such certificates with the usual assignments and powers of attorney executed in blank were outstanding in the hands of bona fide holders, the stock was permitted to be transferred by R. Schuyler in the firm name to other persons, who took the same for value in good faith, without the surrender of the outstanding certificates.

The stock books kept by the transfer agent were not open to the inspection of the public. An examination of those books by the directors would have disclosed Schuyler's frauds at an early stage of the overissue; and the directors were culpably negligent in not thus discovering the frauds.

Geo. F. Comstock and Wm. Tracy, for plaintiffs. Twenty-four counsel appeared for various defendants. DAVIS, J.

This somewhat summary disposition of the preliminary points of the case leaves an open path to its meritorious questions, some of which, however, may be disposed of even more summarily. One of these is the question whether the stock purporting to be created by the false certificates and fraudulent transfers of Schuyler can be valid stock of the corporation and become part of its capital. In the nature of things this is impossible. A corporation with a fixed capital divided into a fixed number of shares can have no power of its own volition, or by any act of its officers and agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the State can alone confer that authority and remove or consent to the removal of restrictions which are part of the fundamental law of the corporate being; and hence every attempt of the corporation to exert such a power before it is conferred, by any direct and express action of its officers is void; and hence every indirect and fraudulent attempt to do so is void; for if such a result cannot be accomplished directly by the whole machinery of the corporate powers, it is absurd to suppose that it can be produced by the covert or fraudulent efforts of one or more of the agents of the corporation. The Special Term was, therefore, right in holding that the spurious stock, attempted to be created by Schuyler in excess of the capital, formed no part of the capital stock of the company, but was utterly invalid; and it necessarily followed from the decision of this court when the case was before it on demurrer, that the plaintiffs were entitled to have all certificates and transfers which represented such spurious stock declared void and ordered to be cancelled.

Another important legal proposition in the case is so clear upon principle, and so distinctly settled by authority, that nothing but confusion can flow from its discussion. It will bear no more than plain A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be. (Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. 31; Angell on Corp., §§ 382, 388, 391; Albert v. Savings Bank, 2 Mary. Dec. 169; Goodspeed v. East Haddam Bank, 22 Conn. 541; Bissell v. Michigan Southern and Northern Indiana Railroad Co., 22 N. Y. 305-309, per Selden, J.; 1 Wend. Black. [note], 476; Green v. London Omnibus Co., 7 C. B. 290 [N. S.]; Frankfort Bank v. Johnson, 24 Maine, 490; Philadelphia and Baltimore Railroad Co. v. Quigly, 21 How. U. S. 209; and cases cited by Campbell, J.)

It follows, from this proposition, that if it were established in this case that the corporation itself issued the false certificates of stock and permitted the fraudulent transfers of spurious stock, it would be liable to the party directly deceived and injured by that transaction. incapacity to create the spurious stock would be no defense to an action for damages for the injury. On the contrary, that very incapacity, since it would render the certificate or transfer a fraud and deceit, would itself be the cause of the injury and the basis of recovery. No court would hear the corporation assert that its wrongful act was beyond its chartered powers, and therefore ineffective to charge it with the injurious consequences of the fraud. But in this case the false certificates were issued and the spurious stock transferred by an officer of the corporation. A corporation aggregate being an artificial body - an imaginary person of the law, so to speak - is, from its nature, incapable of doing any act except through agents to whom is given by its fundamental law, or in pursuance of it, every power of action it is capable of possessing or exercising. Hence the rule has been established, and may now also be stated as an indisputable principle, that a corporation is responsible for the acts or negligence of its agents while engaged in the business of the agency, to the same extent and under the same

circumstances, that a natural person is chargeable with the acts or negligence of his agent; and "there can be no doubt," says Lord Ch. CRANWORTH in Ranger v. The Great Western R. R. Co., "that if the agents employed conduct themselves fraudulently so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." (5 House of Lords Cases, 86, 87; Thayer v. Barlow, 19 Pick. 511; 4 Serg. & Rawl. 16; 7 Wend. 31; Frankfort Bank v. Johnson, 24 Maine, 490; Story on Agency, sec. 308; Angell & Ames on Corp., sec. 382, 388.)

[After expressing the opinion, "that the plaintiffs are estopped by the facts and circumstances of this case, to deny the authority of

Schuyler to do the acts from which the injury to the defendants has

arisen."]

But conceding that the whole question of this case is governed by the law of principal and agent, it becomes of grave significance to ascertain the scope and extent of the powers conferred on the agent. Herein, I think, the case essentially differs from that of the Mechanics' Bank, 3 Kernan, 599. [Mechanics' Bank v. New York & New Haven R. R. Co., 13 New York, 3 Kernan, 599.] The question of that case is stated by Comstock, J., in 16 N. Y., at pages 154, 155, with succinctness and accuracy. He says: "In that case, the transfer agent of the defendants' corporation was authorized to sign and issue certificates of stock on a transfer from one shareholder to another upon the books and on the surrender of the previous certificates. The agent, for his own purposes, signed and issued certificates to a large amount where there had been no such transfer or surrender. These unauthorized and spurious instruments were in form precisely like those that were genuine and authorized. Trusting to their false appearance, the plaintiffs took one of them by transfer and advanced money upon it, which they recovered in the New York Superior Court. We held they could not recover, and reversed the judgment, placing our decision prominently upon the ground that the acts of the agent were not within the real or apparent scope of the power delegated to him."

It now appears that the agent, in addition to the power thus stated, had authority also to issue certificates in precisely the same form, to the original subscribers for the stock, and to some extent did do so; that he had authority to dispose of the stock of the company not taken by the original subscribers (of which there was a large amount), and issue certificates in the same form to the purchasers; that he had authority to dispose of certain forfeited shares, and in such case issue like certificates; that he had authority to receive transfers to himself of stocks on behalf of the company, and transfer the same to purchasers and Issue like certificates to them; that before the increase of the capital to \$0,000 shares, he did issue to his own firm a large number of false certificates which became the basis of transfers on the books to third parties, and by some arrangement were absorbed into the enlarged capital as genuine stock; that he acted to some extent as financial agent of the company, and through his firm raised large amounts, "indiscriminately, on genuine and spurious certificates of stock," which were paid out on the check of the firm on behalf of the company and on its construction account; that to him was intrusted the keeping of all the stock accounts of the company and its dealers at the New York office, and in those accounts he entered all his transactions, both false and genuine; that the books were kept closed to dealers; that his management of the affairs of the office, and of all these various matters, was never investigated or questioned.

It is in all these facts that we are now to seek for "the real or apparent scope of the power delegated to him." As we descend from the sharp promontory of the Mechanics' Bank case to this broad plane of powers and their mode of use, we stand amongst new and far different lights and shadows. We find ourselves quite unable to say, with the able jurist in that case, "He (Schuyler) had no power to sell stock at all, and none to issue certificates except as incidental to a sale between existing stockholders, and then it depended on the condition precedent of a transfer on the books and a surrender of a previous certificate for the same stock." Nor to say, "His appointment in its very terms, which all dealers are supposed to have been acquainted with, did not include his acts, and there is no pretense that it was ever enlarged by any holding out, or recognition of his acts."

When his certificate, regular in form in all respects, is offered in the market, the buyer is not able to refer it to the narrow restrictions of the by-law, for how does it appear that it is not one issued to an original subscriber, where there was no transfer to be made, and no prior certificate to be surrendered; or that it is not one issued to a purchaser of the original stock which Schuyler was empowered to sell and certify in this manner; or that it is not of stock that has been transferred to the agent on account of the company and which he was likewise authorized to sell; or that it was not some of the forfeited shares which he was directed to sell and certify; or that it was not of the kind which, by "some arrangement," is absorbable into the capital as genuine, even if it be in fact spurious; or that it is not issued to raise money for the benefit of the construction fund of the company; or that it is not of the spurious kind which the company have heretofore allowed to be cured by a subsequent acquisition of stock by the Schuylers, and a transfer thereafter under the power.

Whether it does not belong to some one of these classes there are no earthly means of ascertaining save by the representation of the agent. The books are sealed; but if open and most thoroughly investigated they would not necessarily negative the power to issue for some of the purposes for which authority had been given, directly or by recognition; for even if run down to absolute spuriousness it is still open to

say, this is of the kind of spurious certificates upon which the company raise money for their construction accounts, or the kind which they legitimatize by subsequent arrangements of the capital; or the kind which, by the custom of dealing becomes good, if a transfer be made under it at a moment when the Schuyler firm happens to have so much stock to its credit on the books. And the accounts for seven years show that all these kinds are treated on the same footing as genuine shares.

In this view of the extent of the authority with which Schuyler was clothed by the company, either by direct appointment or by recognition and ratification, or by actual enjoyments of the fruits of his acts, or by long acquiescence therein from which a presumption or implied agency arises, I have come to the conclusion that the issuing of the certificates by him must be held to be within the scope of the real and apparent authority which he possessed; and the remedy of the defendants is not prejudiced by the fact that he used and intended to use the avails for his own purpose. In short, they stand precisely in respect to the remedy where they would if the board of directors had issued the same certificates in fraud of their powers under the law, and obtained the defendants' moneys thereon.

But these views do not dispose of a question that has been argued in this case with an elaboration and power seldom equaled in a court of justice. From the manner in which the decision of the judges is stated in the Mechanics' Bank case, it is difficult to tell what precise points were designed to be passed upon by the court. It is open to conjecture that the case may have passed off on the ground of want of privity between the plaintiffs and defendants, as was intimated by Selden, J., in The Farmers' & Mechanics' Bank v. The Butchers' & Drovers' Bank (16 N. Y. 142), or on the ground, as suggested by H. R. Selden, J., in Griswold v. Haven (25 N. Y. 598), "that Kyle, to whom the certificate issued, being privy to the fraud, had of course no claim against the company, and that his assignees could have no greater rights than himself;" or upon the mistaken idea that the court of errors, in reversing The North River Bank v. Aymar, has settled the law adversely to the opinion of the Supreme Court in that case.

But whatever may have been the views of other members of the court, there is no mistaking the ground on which the judge who pronounced the opinion intended to put the liability of a principal for the acts of an agent. It is, in brief, that a principal is bound only by the authorized acts of his agent. The proposition involved was fairly put by the learned judge in this form: "Suppose an agent is authorized by the terms of his appointment to enter into an engagement, or series of engagements, on behalf of his principal, and while the appointment is in force he fraudulently makes one in his own or a stranger's business, but in the form contemplated by the power, and which he asserts to be in the business of his employer by using his name in the contract,

can the dealer rely upon that assertion, or is he bound to inquire and to ascertain at his peril whether the transaction is not only in appearance but in fact within the authority? According to the decision of the Supreme Court of this State, in the case of The North River Bank v. Aymar (3 Hill, 262), he can." The judge then proceeds to show that the case cited had been reversed by the court of errors; and then to discuss the question with his own clearness and vigor, reaching a conclusion which he expresses in these words: "The appearance of the power is one thing, and for that the principal is responsible. The appearance of the act is another, and for that, if false, I think the remedy is against the agent only. The fundamental proposition, I repeat, is, that one man can be bound only by the authorized act of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

The counter proposition was again stated by Selden, J., in The Farmers' & Mechanics' Bank v. The Butchers' & Drovers' Bank, in this form: "It is, I think, a sound rule that when a party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has or is presumed to have any knowledge with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent and which cannot be ascertained by a comparison of the power with the acts done under it."

Manifestly, here is an "irrepressible conflict" between these propositions, and we are called upon to determine which expresses the settled law of this State.

. . . it is impossible to escape the conclusion that the law of this State, as settled by adjudication at this day, is, as put by H. R. Sel-DEN, J., in Griswold v. Haven, "That where the authority of an agent depends upon some fact outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact." The contrary rule, though asserted with confidence and vindicated with great force in the case of The Mechanics' Bank, was not necessarily adopted by the court, and that case does not so determine. It may with confidence be asserted that all the cases in this State, both before and since, lay down a different rule from that supposed in the Mechanics' Bank case, to have been established by the court of errors; and so do the elementary writers upon whom we are accustomed to rely. (Story on Agency, 452; Paley on Agency, by Lloyd, 294, 301, 307; Bacon Abr., Tit. Master and S., K; 2 Kent Com., 620, notes, 1 Blk. Com., 432.) It were long, by quotation, to show that the cases just noticed necessarily rest on this doctrine. A short allusion to their facts must suffice. The condition of the authority in The North River Bank v. Aymar, was that the paper should be made in the business of the principal. In The Butchers' and Drovers' Bank case, that the drawee should have funds in deposit enough to pay the check. In Griswold v. Haven, that the grain for which the receipt was given should actually have been received. In Exchange Bank v. Monteath (so far as it rested on a question of agency), that the drafts should be for the use and benefit of the defendant's line of boats. In each of these cases, the extrinsic fact which constituted the condition of the authority was peculiarly within the agent's knowledge, and was necessarily represented to exist by the execution of the agent's powers. It might or it might not be discovered by inquiry. So in this case, in the narrow view in which we are now considering it, the condition upon which the agent could issue the certificate was, a transfer in the books and the surrender of a previous certificate, if any had before been issued. These facts are wholly extrinsic and peculiarly within the knowledge of the agent, as part of the special duties to be attended to by him, and were represented by him to exist by the certificate itself. I can see no shade of difference between the question in this case and in those cited, and which seem to me to settle the law. The rule which governs this class of cases, in my judgment, rests upon a sound principle. As was said by Selden, J., in Griswold v. Haven, "The mode in which the liability is enforced in all these cases, is by estoppel in pais. The agent or partner has in each case made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the fact so represented." It goes back to the celebrated aphorism of Lord Holt, in Hern v. Nichols (1 Salk. 289), "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger," or as more tersely expressed by Ashurst, J., in Lickbarrow v. Mason (2 T. R. 70), "Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." (Story on Part., § 108, and authorities there cited.) In truth, the power conferred in these cases, is of such a nature that the agent cannot do an act appearing to be within its scope and authority, without, as a part of the act itself, representing expressly or by necessary implication, that the condition exists upon which he has the right Of necessity the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without as res gestae making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer, you intrusted your agent with means effectually

to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only in fact authorizes the act which involves a representation, which, from his confidence in the agent, he assumes will be true; but it may be false, and the risk that it may he takes because he gives the confidence and credit which enables its falsity to prove injurious to an innocent party. I have already shown how this principle in many cases sustains liability after all actual authority has been withdrawn, as between the principal and parties who have a right to infer that the authority continues.

The contrary doctrine would be singularly inconvenient, if not absurd, in practice. For instance, under a general power to draw bills, which means, of course, only in the business of the principal, no party could safely take a bill drawn by the agent without pursuing the inquiry whether it was drawn in such business, to extremes. If the peril is on the party to whom the bill is given, nothing short of personal application to the principal himself can relieve it, for nowhere short of that is absolute certainty. Every intermediate appearance or representation may be false or deceptive, and the rigid rule of actual authority will be satisfied with nothing less than absolute verity. So, then, the general power carries no safety whatever, since each bill made under it must be verified as to extrinsic facts by resort for perfect security to the principal himself.

Or to bring the illustration nearer to this case: It is claimed that every receiver of a stock certificate, executed by an agent, must verify, at his peril, the extrinsic facts that a transfer of the stock has been made and the former certificate surrendered. But how? If he go to the board of directors they can only refer him to the transfer agent or the books kept by him, for these are alone their sources of information. If he resort to the books they are at best but other representations of the agent which, if they in form show a transfer, may still be deceptive, and nothing but a transfer of actual stock will answer the condition. He must therefore trace the lineage of the stock represented by the certificate to some point behind which no "strain upon the pedigree" will enable the corporation to bastardize the issue. Such a rule would be vastly detrimental to the business interests, both of corporations and of the public.

It would be far better to establish a rule that no man shall take an instrument made by an agent without first having the principal's certificate that it is genuine and authorized; and even this would be impracticable in corporations, for every new certificate, being another act

of an agent, would only open a new circuit of inquiry. But such is neither the policy nor good sense of the law.

It is a mistake to suppose that the conventional rule of commercial negotiability has anything to do with this question, except in cases where the paper carries no notice on its face that it is made by somebody assuming to be an agent. That rule stands upon an arbitrary doctrine of the law merchant, and not at all upon any principle of estoppel. It extends only to instruments which usage or legislation has brought within it; and its substance is, that by force of the arbitrary rule the possessor of such negotiable instrument has power to give by delivery to a bona fide purchaser for value, a good title notwithstanding any defectiveness in his own. Hence, under it a finder or a thief may confer such title with none in himself, not because the loser is estopped by his misfortune from asserting his rights, but because from real or supposed commercial necessities, "ita lex est scripta." But it is a fixed requisite of the rule that the buyer shall be for value without notice, and therefore nothing that gives notice on its face is, in that particular, within the rule. So an instrument that shows on its face that it is made by one man for another, at once warns the taker to inquire if the assumed agent be authorized, and that question becomes one independent of the arbitrary rule of the law merchant, and dependent on the doctrines that govern the law of principal and agent. (Atwood v. Munnings, 7 B. & C. 278; Fearn v. Felica, 8 Scott N. C. 241.)

I concur, therefore, with Judge Selden, when he asserts that in no respect, except as it touched the question of privity of contract, was the negotiability of the paper of any importance in the case of *The North River Bank* v. *Aymar* (25 N. Y. 602). In that case it appeared on the face of the paper that it purported to be made by an agent. A different rule as to the effect of negotiability may well obtain where the paper is negotiable within the law merchant, and bears on its face no notice whatever that it is made by some party other than the one it purports to charge, as where it is made in a firm name, or in the form and by the officers, through and by which a corporation can by law issue its authorized evidences of debt.

We have already seen how far privity is essential in actions of tort. (Redfield on Railways, 61 and note; Gerhard v. Bates, 20 Eng. L. & Eq. 129, &c.)

I shall not inquire how far the English cases, and especially the leading case of Norway v. Grant (10 C. B. 665), so much relied upon, may be in conflict with the law of this State. Both the Judges Selden have sought to show that Norway v. Grant is distinguishable from the cases under their consideration, and I will only add that if they did not succeed in pointing out the distinction, and the case really stands in conflict, so much the worse for that case.

We may come back, therefore, to the solid ground of The North River Bank v. Aymar, regarding it only as shaken down to greater

firmness by the severe ordeal of The Farmers' and Mechanics' Bank case, and with confidence declare the true doctrine of this branch of the law of agency to be, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. In Griswold v. Haven, this rule was distinctly settled. The dissenting opinion touched only the right to maintain the form of action brought in that case, but a majority of the court held that the representation of the agent not only charged the principals, but estopped them from denying the actual possession of the wheat asserted to be in store, so as to defeat an action of trover or replevin to recover the property. In this view I see no ground upon which the plaintiffs can, in this case, be permitted to deny that Schuyler was acting within the scope of his authority in issuing the false certificates; and they are therefore to be treated as though issued by the board of directors.

[The judgments against the plaintiffs for damages were affirmed.]

BOSTON MUSIC HALL ASSOCIATION v. CORY.

1880. 129 Massachusetts, 435.

Colt, J. In 1874, Howard L. Hayford sold five shares in the stock of the Boston Music Hall Association to his brother Nathan H. Hayford, to whom he delivered a stock certificate, and upon which he indorsed and signed a written transfer in the usual form. No transfer was made on the books of the corporation, and there was no provision in the charter or by-laws of the association requiring it. It was not until after the shares were levied on as the property of Howard L., in May, 1878, that the corporation was notified of the alleged sale and transfer to Nathan H. In the mean time Howard L., with the knowledge of his brother, collected the annual dividends declared on the stock, attended meetings of the stockholders, and served upon committees appointed at such meetings. Under the levy made in 1878, Barney Cory bought the stock as the property of Howard L.; and the question presented by this bill of interpleader is, which of the two acquired the title.

The case comes up on an appeal from the decree of a single judge in favor of Nathan H. Hayford, accompanied by a report of the evidence taken at the hearing. In the first place, it is contended that the vidence fails to show that the stock was sold and assigned to Nathan

H. in good faith at any time before the levy. Upon this question of fact, the decision of the single judge will not be reversed, unless it clearly appears to be erroneous. Reed v. Reed, 114 Mass. 372. Montgomery v. Pickering, 116 Mass. 227.

The only evidence of the transaction in 1874 comes from the two Hayfords, who were the parties to it. But we cannot say that the fact that the apparent ownership remained unchanged for such an unusual length of time upon the books of the corporation, and that Howard L. received the dividends and continued to act as the real owner, is sufficient to lead us to believe that the judge erred in not treating it as sufficient to overcome the positive evidence of a valid sale of the property, coming from the two witnesses who were before him, and of whose truthfulness he had the best opportunity to judge.

In the next place, it is strenuously urged that, by force of the various statutes of this Commonwealth relating to the ownership and transfer of stock in corporations, authorizing the attachment of shares, requiring returns to the Secretary of the Commonwealth, and imposing a personal liability on stockholders for the debts of the corporation, there can be no transfer of stock, valid against the claims of an attaching creditor. unless such transfer be recorded in the books of the corporation. Gen. Sts. c. 68, §§ 10, 12; c. 123, §§ 59-61; c. 133, § 46. St. 1864, c. 201. The intention of the Legislature, it is said, must have been to provide for the owners of stock a convenient and uniform method of transferring title on the books of the corporation, which should be the only valid transfer as to creditors, and others interested; and, although the statutes have not provided in express terms that, as to creditors, transfers shall not be valid till they are so recorded, yet such, it is contended, is the necessary implication, for otherwise the design of the statutes, requiring registration and making the shares liable to be taken for debts, would be defeated. But this consideration is not sufficient to control the law as long since settled by the decisions of this court. It requires a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivering of a stock certificate, with a written transfer of the same to a bona fide purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor. Sargent v. Essex Marine Railway, 9 Pick. 201. Sargent v. Franklin Ins. Co. 8 Pick. 90. Fisher v. Essex Bank, 5 Gray, 373. Dickinson v. Central National Bank, ante, 279.

It would not be in accordance with sound rules of construction to infer, from the provisions of several different statutes passed for the purpose of obtaining information needed to secure the taxation of such property, or for the purpose of subjecting stockholders to a liability for the debts of a corporation, or for protecting the corporation itself in its dealings with its own stockholders, that the Legislature intended thereby to take from the stockholder his power to transfer his stock in any

recognized and lawful mode. If a change in the mode of transfer be desirable, for the protection of creditors, or for any other reason, it is for the Legislature to make it by clear provisions, enacted for that purpose.

We see nothing in the facts which can be held to deprive Nathan H. Hayford of the stock in question, on the ground that he is chargeable with laches in not causing the transfer to be sooner recorded, or that he is now estopped from setting up his title to the shares in his possession. It must be taken, upon the findings of the judge, that Nathan H. bought these shares in good faith in 1874; and that all which the law required was done to vest a perfect title in him, as against an attaching creditor of Hovard L. He was under no legal duty to have the transfer recorded in order to perfect his title as against strangers, and he can be charged with no neglect or laches which would involve the forfeiture of his title.

The evidence in the case does not require us, against the findings of the single judge, to find that Nathan H. is estopped to set up his title against a creditor of Howard L. The acts and declarations of the latter, after the sale, would not affect the title, except so far as they were authorized by Nathan H., and there is nothing to show any act or declaration authorized by the latter, with intent to give a false credit to Howard L., or that any creditor of his was in fact defrauded.

Decree affirmed.

- F. C. Welch, for the attaching creditor.
- J. P. Treadwell, for the transferee.

SCRIPTURE v. FRANCESTOWN SOAPSTONE CO.

1871. 50 New Hampshire, 571.1

Assumpsit for not delivering to the plaintiff certificates for forty-five shares of stock in the defendant company, which plaintiff had pur-Plaintiff purchased the stock of Barton on chased of one Barton. May 24, 1867. Barton transferred the same to him by his indorsement upon the back of the certificate. On Feb. 3, 1868, the said certificate so transferred was presented to the treasurer of the company, and a new certificate for those shares demanded by the plaintiff. The treasurer declined to issue a new certificate, for the reason that the shares had been attached as Barton's property, on January 28. 1868, in a suit brought by the Francestown Soapstone Company against Barton. At the trial the plaintiff proposed to introduce certain evidence to prove that the company had notice of the aforesaid sale and transfer before the attachment. Thereupon the cause was taken from the jury for the purpose of determining, as matter of law, whether the evidence offered was competent to prove notice or knowledge in the

¹ Statement abridged. Arguments omitted. -- ED.

company; and whether, with such notice or knowledge, the attachment would be valid to hold these shares against the plaintiff.

A. W. Sawyer, for plaintiff.

Geo. Y. Sawyer & Sawyer, Jr., for defendant.

LADD, J. The sale and transfer of these shares were made by Barton to the plaintiff May 24, 1867; and the case shows that the plaintiff paid \$95 per share for them, the par value being \$100.

It is alleged in the declaration, that on February 3, 1868, the plaintiff caused the certificate and assignment to be delivered to the treasurer of the company; and it appears that the reason assigned for not issuing to him a new certificate was, that prior to that time, namely, on the 28th day of January, 1868, said shares had been attached as Barton's property on a writ in favor of the company against him.

If by the attachment a valid lien was created in favor of the company, it was under no obligation to enter the transfer on its books at the time the certificate was presented; and the plaintiff cannot maintain this suit.

The question then is, What effect shall be given to the attachment made January 28, 1868?

The plaintiff offered to prove that at the time of the sale said Barton was president of the corporation, and acted as its general agent in superintending the affairs thereof, and continued so to act until January 27, 1868, the day before the attachment was made; that the agent who succeeded Barton, and who procured the attachment and caused a levy to be made on the shares, was a director in 1867, and knew of the sale and transfer of the shares from Barton to the plaintiff prior to the time of the attachment; and that the treasurer of the company had actual notice of the sale and transfer as early as June, 1867; and other facts tending to show knowledge of the sale by the corporation at or about the time of the transaction.

We think this evidence was clearly admissible for the purpose proposed. The president and treasurer, by the by-laws, were directors ex-officio; and it is fair to suppose that they were active members of the board, participating largely in the control and management of the affairs of the corporation. But even if those officers had not been members of the board of directors, there would probably be no difficulty in holding that notice to a general agent, who has the superintendence of the affairs of a corporation, is notice to the corporation, and therefore that the defendant is chargeable with knowledge possessed by its president and general agent, Barton.

Angell and Ames on Corp., § 305, and cases in note; Hovey v. Blanchard, 13 N. H. 145; Marshall v. Ins. Co., 27 N. H. 157; Campbell v. Ins. Co., 37 N. H. 35; Patten v. Ins. Co., 40 N. H. 375; Fitzherbert v. Mather, 1 T. R. 12; N. Y. & N. H. Railroad Co. v. Schuyler, 34 N. Y. 84.

We are thus brought to the question whether the attachment made by the defendant, with knowledge that the shares had been previously sold and transferred by Barton to the plaintiff, will hold them, for the reason that the transfer had not been made on the books of the company according to the provision contained in the certificate.

It does not appear that any mode of transfer is provided in the charter, and the only provision in the by-laws on that subject is contained in Art. 10, as follows: "Shares may be transferred by assignment on the back of the certificate, and surrender of the certificate to the treasurer." This corresponds with the provision in the certificate, except that the words "only on the books of the company" appear in that instrument.

It is not necessary to inquire whether the provision contained in the by-laws was authorized by the charter; nor whether there is any difference in legal effect between a provision in the charter and one in the by-laws which have been adopted in pursuance of an authority conferred by the charter; nor whether the provision in the certificate should have any effect by way of contract between the share owner and the corporation; for we think that, by a fair construction of the general law of the State in force at the time of this transaction, a transfer of shares in a corporation of this sort, to be complete and perfect for all purposes, must be entered upon the books of the company - Rev. Stats., chap. 141; Pinkerton v. The M. & L. Railroad, 42 N. H. 424 — the object being, as is well said by defendant's counsel in their brief, "not only to give notice of the title, but to furnish an authentic record that would determine membership in the corporation, the right to vote, private liability for debt, liability to taxation, and all other incidents of ownership," &c.

It being admitted, then, that, for the protection of these various rights and interests of the corporation, the public, and creditors of the stockholders, the law provides that the title of a purchaser of shares shall not be complete, as against those having these various interests, until the transfer is entered on the books of the company, it becomes a very important inquiry to ascertain what is, in point of fact, the origin and basis of a purchaser's title to such shares when they pass from seller to buyer. Does it originate in and rest upon the contract of sale between the parties, or is it a creation of law, dating its birth from the record of the transfer on the company books?

A share in a corporation, which has for its object a division of profits among its stockholders, has been defined to be "a right to partake, according to the amount of the party's subscription, of the surplus profits from the use and disposal of the capital stock of the company to the purposes for which the company is constituted." Angell and Ames on Corp., § 557.

It cannot be disputed that this right is *property* of a definite and important character, with many of the qualities of visible, tangible, personal property, and having a value, and as capable of appreciation as vessels or merchandise, or other personal chattels. Shaw, C. J., in *Fisher* v. *Essex Bank*, 5 Gray 377. From this it follows, by inevitable inference, that it may be the subject of sale as much as any other

species of property, real or personal, so that, as between vendor and vendee, the title may pass by their own act, and be thereby vested absolutely in the vendee.

It seems too clear for argument, that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them.

This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All the seller can do, that corresponds at all to the delivery of personal chattels in other cases of sale, is, to hand over to the buyer his certificate, with a sufficient assignment by deed or otherwise to entitle him to a transfer of the shares on the books of the company. When the seller has done this, his power and duty in the matter are ended, and it is at the option of the purchaser whether the transfer shall be recorded or not.

If the purchaser omits to have the record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a bona fide purchaser.

It is difficult to see any substantial difference between the position of this plaintiff after the sale and assignment of the shares to him by Barton and before a transfer was made on the books, and that of the grantee in a deed of land before his deed is recorded. In both cases the seller has parted with his title, and, as to him, the buyer has acquired it. It is only third persons in either case whose rights or interests are affected by the omission.

In the case of an unrecorded deed, the grantor continues to be clothed with evidence of ownership after the conveyance, very similar to that which remains with the seller of shares before the transfer has been entered on the books. The record shows that he is still the owner of the land, when in fact he is not; and, so far as any interest a creditor can have in the matter is concerned, the same is precisely true in the case of shares in a corporation sold but not transferred on the books.

The statutes which we hold require the transfer of shares to be entered on the books of the corporation kept for that purpose, are certainly no more explicit and absolute than that which requires the recording of deeds. The object of the law, so far as creditors are concerned, is the same in both cases.

As between the parties the title passes by contract and not by the record in both cases alike.¹

It is difficult to suggest any reason for holding that actual notice of an unrecorded deed to a subsequent purchaser or attaching creditor shall be equivalent to a record, so far as that purchaser or creditor is

A note by the reporter is omitted. - ED.

concerned, which does not with equal force require us to hold, in the present case, that actual notice to the defendant of a sale of these shares was equivalent, so far as its rights as a creditor are concerned, to a transfer entered in due form upon its books. This view is sustained by *Gooding* v. *Riley*, 50 N. H. 400, where the chief justice, upon an exhaustive review of the authorities bearing upon the question, arrives at the conclusion that purchasers or mortgagees of personal property, having notice of a prior outstanding equitable title, are affected by such knowledge in the same way and to the same extent as the grantee of land is affected by knowledge of a prior unrecorded deed; that both stand upon the same equitable principle.

The same result, substantially, is reached, if we consider that the omission of the plaintiff to have the transfer recorded places him in the same position as a purchaser of chattels, who permits them to remain in the hands of the seller after the sale.

Taking that view, the consequence contended for by defendant's counsel does not follow. The circumstance of such retention of possession may be explained. It is true that, in the absence of explanation, a secret trust will be presumed; but when an explanation is offered, it is for the jury to say, under proper instructions, whether the explanation is sufficient; and the fact that possession was so retained, is for them to weigh in connection with all other evidence bearing upon the actual character and complexion of the transaction between the parties.

Here the defendant had notice of the sale and assignment, and, as we hold, of all the facts attending the transaction, for the reason that Barton, its general agent, by whose knowledge it is bound, was a party to the transaction and knew all about it. Under these circumstances it can hardly be heard to say that it inferred fraud from the plaintiff's conduct, as a conclusion of law, when it knew, as matter of fact, that no fraud did really exist.

Suppose, after the sale by Barton to the plaintiff, Barton had sold the same shares again and applied the proceeds of such sale to his own uses. If the second purchaser were ignorant of the prior sale, he would get a good title, although Barton would have been guilty of a fraud against the plaintiff of the most gross and flagrant character. But if this second purchaser had notice of the former sale — was aware of the situation of the title as between Barton and Scripture — by concerting with the former to deprive the latter of his property he becomes a party to the fraud, and no process of reasoning, in logic or morals, will lead to any other result but that he would be equally guilty with the seller. To hold that such a purchaser acquired a good title would be to countenance the most scandalous bad faith and encourage dishonesty.

The difference between an attempt to gain a title under such circumstances by purchase and by an attachment is not very apparent, and certainly not very broad. At all events, we think it entirely clear

that what cannot be accomplished in one way cannot be brought about in the other.

In any view we are able to take of the case, we think the question for the jury is, whether the sale by Barton to Scripture was a bona fide sale, or whether it was so tainted with a secret trust, or other element of fraud in fact, that it cannot be sustained; and upon that question the price paid for the shares as compared with their actual value, the omission of plaintiff to have the transfer recorded, and all other facts and circumstances tending to throw light upon the actual character of the transaction, will be proper evidence for the jury to consider. In short, that the sale may be attacked in the same manner and upon the same grounds as though the transfer had been entered upon the books of the corporation at the time the fact of the sale was brought to its knowledge.

Case discharged.

HOTCHKISS AND UPSON CO. v. UNION NATIONAL BANK.

1895. 37 U.S. Appeals, 86.1

CIRCUIT COURT OF APPEALS. Sixth Circuit.

Appeal from U.S. Circuit Court for the Northern District of Ohio.

Bill in equity by Union National Bank of Cleveland, Ohio, against the Hotchkiss & Upson Company, a Connecticut corporation, to enforce a lien upon stock of the latter company alleged to have been acquired by a pledge from Charles A. Hotchkiss. It appeared that Hotchkiss, as a collateral security for a loan, assigned in pledge to the bank certificates for 140 shares of the Hotchkiss & Upson Company. The assignment consisted in delivering the certificates to the bank; with a blank power of attorney for the transfer of the stock upon the books of the company, executed by Hotchkiss. The stock has never been transferred upon the books of the company to the bank, and no copy of the power of attorney was ever filed in the office of the company.

Subsequently to the above pledge, Hotchkiss embezzled a large amount of the funds of the Hotchkiss & Upson Company, of which he had charge as president.

It is contended that by force of the general laws of Connecticut relating to corporations a lien was given to the company upon the stock standing upon its books in the name of Hotchkiss for the amount of the indebtedness created by his embezzlements, and that this lien is paramount to that of the bank, for the reason that there was no transfer of the stock by Hotchkiss to the bank upon the books of the company, and no copy of the power of attorney, was filed in the office of the company as required by the law of Connecticut in order to make the assignment good as against the company.

¹ Only part of the case is given. - ED.

The provision of the statutes of Connecticut giving the company such lien is found in section 1923 of the General Statutes of that state (Revision of 1887), which reads as follows: "When not otherwise provided in its charter, the stock of every corporation shall be personal property, and be transferred only on its books in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock owned by any person therein for all debts due to it from him." And section 1924 declares how such stock may be pledged, and the manner in which such pledge may be made effectual, as follows: "Shares of stock in any corporation, organized in this state under the laws of this state or of the United States, may be pledged, by executing and delivering a power of attorney for its transfer, with the certificate of stock therein mentioned, to any party to whom the pledge is made; but no such pledge, unless consummated by an actual transfer of the stock to the name of such party, shall be effectual to hold such stock against any person but the pledger and his executors and administrators, until a copy of said power of attorney shall be filed with the cashier, treasurer or secretary of said corporation."

The provisions of section 1924 were not complied with in the making of the above pledge. But the bank introduced evidence tending to show that the Hotchkiss & Upson Company had notice of the pledging of these shares before the embezzlement commenced. The court below found that the company had such notice; and *held*, that the bank's lien was superior to that of the company.

A decree was made, sustaining the bank's lien upon the 140 shares pledged as above stated.

J. E. Ingersoll, for appellant.

W. B. Sanders (Squire, Sanders & Dempsey were on the brief), for appellee.

SEVERENS, J.

For, assuming that the bank was bound to take notice, not only of the charter, but the general laws of Connecticut affecting the Hotchkiss & Upson Company, we think it was competent for the bank to show that the Connecticut corporation had the notice of the pledge of its stock to the bank for the payment of the \$15,000 note, which it was the purpose of section 1924 of the laws of that state, above quoted, to secure.

It is a widely prevalent doctrine, applying to a variety of statutes enacted for the purpose of protecting parties dealing bona fide with property upon the assumption of its ownership by the persons dealing with them, against prior liens and conveyances, that, notwithstanding the generality of the language of such statutes declaring that such former liens and conveyances should be held void, if not registered in conformity with the provisions of the statute, as against subsequent purchasers, yet, seeing that the whole object of such provisions was to guard the subsequent purchaser against transfers of which he had no

notice, if the object of the statute had been subserved by actual knowledge of the fact, the prior transferee would be protected. And there is no reason why this should not be so. Such laws are not designed to accomplish so unjust a result as that a person having knowledge of another man's equities may defeat them by an act of his own, taken with such knowledge. Converting those statutes to such purpose would be quite contrary to the spirit of their enactment. That such is the general doctrine upon this subject cannot, we think, be disputed. The cases are too numerous to justify a review of them here. Many of the principal decisions are collected in 1 Jones, Mortg. (5th Ed.) § 538, and the result of them stated; and it is there said: "The doctrine is the same under statutes which declare without qualification that an unacknowledged or unrecorded deed shall be void as against purchasers, or as against all persons who are not parties to the conveyance."

The rule is the same in respect to personal property. No distinction in the application of the doctrine can be based upon a distinction between the two classes of property. Jones, Chat. Mortg. (4th Ed.) § 308. It rests upon a broad and fundamental equity. It must be conceded that there are occasionally to be found cases which seem to lead to a different conclusion, but the general current and weight of authority is as above indicated. No doubt there are exceptions to this rule where the statute goes further than to provide for the mere giving of notice, and expressly declares that the instrument shall only become valid upon its registration. In such case the condition is made essential to its validity.

The decisions of the supreme court of the state of Connecticut show beyond doubt that the rule which prevails in that state upon this subject is the same as the rule which prevails generally in the courts of the several states and of the United States, and it may be regarded as the settled rule of Connecticut that statutes of a kindred character, and having the same purpose as that here under consideration, are to be construed, not as rendering prior transactions void as between the parties themselves or others who had equivalent notice of such transactions, and who, therefore, were in no predicament requiring protection, but as provisions whose whole scope and intended effect was the protection of parties who had an equity arising upon the fact of their having altered their situation, in reliance upon the apparent condition of things. Wheaton v. Dyer, 15 Conn. 307; Blatchley v. Osborn, 33 Conn. 226; Hamilton v. Nutt, 34 Conn. 501.

[Remainder of opinion omitted.]

Decree affirmed.

FORT MADISON LUMBER CO. v. BATAVIAN BANK.

1887. 71 Iowa, 270.

ACTION in equity to compel the defendants to interplead, in order that their respective claims against each other, and against the plaintiff company, may be determined. The facts appear to be that one Weston was at one time the owner of certain shares of stock in the plaintiff company, and the same stood in his name on the books of the company. In 1883 he borrowed money of the defendant, the Batavian Bank of La Crosse, Wisconsin, and assigned to it certificates of his stock as collateral security; but no transfer of the stock was made upon the books of the company. Afterwards he became insolvent. his creditors were the defendants D. Hammell & Co., the Clark County Bank and the Neillsville Bank. These creditors brought actions upon their respective claims in the circuit court of Lee county, Iowa, and caused writs of attachment to be issued, and levied upon the stock in At the time of the levy they had no knowledge of any transfer of the certificates by Weston. Shortly after the levy the Batavian Bank procured the secretary of the plaintiff to indorse upon the stubs of the book from which the certificates had been detached an entry or memorandum of a transfer. This action is brought for the purpose of procuring a determination of the question as to whether the rights of the Batavian Bank, as pledgee, are subject to the attachments, or the attachments subject to the rights of the Batavian Bank. The court held that the attachments were subject to the rights of the Batavian Bank. The defendants D. Hammell & Co., the Clark County Bank and the Neillsville Bank appeal.

Casey & Casey, for D. Hammell & Co., appellants.

M. C. Ring, R. F. Kounts and Casey & Casey, for the other appellants.

C. W. Bunn and W. J. Knight, for the Batavian Bank.

Van Valkenburg & Hamilton, for the other defendants.

Frank Hagerman, for plaintiff.

Adams, C. J. The question whether a transfer of stock in an incorporated company in this state, when not entered upon the books of the company, is valid, as against attaching creditors of the assignor without notice, is now presented for the first time in this court. Its determination must depend upon the view which should be taken of the meaning of the provision found in section 1078 of the Code, and which is as follows: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by and to whom transferred, the numbers or other designation of shares, and the date of the transfer."

The question now presented does not arise between the parties to the transfer. Without any question, the transferee will hold the stock, as against the transferer, for all the purposes for which the transfer was made. The question arises between one of the parties to the transfer and others who were not parties, and who dispute the validity of the transfer. If we give the statute a literal construction, we must hold that the transfer is not valid. To hold otherwise, we should be obliged to enlarge the exception. The rule would be that the transfer is not valid, except as between the parties, and except as between the transferee and the attaching creditors of the transferer. But ordinarily, in the construction of a statute, an exception is not to be enlarged.

The question, however, is not free from difficulty. It is urged by the appellee, the transferee, that an attachment can in no case bind more than the interest of the debtor; and, if the transfer is valid between the parties, it is said that it follows, from the necessity of the case, that the attaching creditor of the transferer acquires a lien only upon such interest as the transferer has left, if any.

That there is plausibility in this argument cannot be denied. But in our opinion it is not sound. It would carry us too far. It would make a transfer that is valid between the parties to it valid as against all persons claiming under the transferer. But no one pretends that this is so. If the transferer sells again, and to an innocent purchaser for value, who obtains a transfer upon the books, no one doubts that he would become both the legal and equitable owner; and this is true though the transferer had, in one sense, no interest in the stock which he could sell. It is entirely competent, then, for the legislature to provide arbitrarily that a given transfer shall be deemed by a court valid or invalid, according to the parties which shall be before the court. The transfer is valid if the parties before the court were the parties to the transfer, and otherwise not. This, at least, is the rule of the statute, and must be followed, unless some equitable consideration controls. If the attaching creditors of the transferer had knowledge of the transfer, it may be that a court of equity would protect the transferee's rights. It has frequently been so held, but that question is not before us.

Our conclusion thus far has been based upon what seems to be the fair meaning of the language of the provision. But we are entitled to take a broader view, and look at other provisions. It is provided in the same section that the "books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same." The above, it will be seen, is a provision that the books shall show, at any given time, precisely who the stockholders are at that time. The books, too, shall be kept open for inspection by any one. Where a provision is made for a record of spe-

cific facts, and another provision that the record shall be kept open for inspection by any one, the intention must be that any one inspecting the record should be entitled to rely upon it as true; and, if a person inspecting the record expends money upon the faith of it, any other person through whose negligence the record fails to show the truth should be estopped from setting up its untruthfulness.

It is contended by the appellee that the provision for a record, designed to show who the stockholders are at any given time, is for the sole benefit of the corporation itself. But there is nothing in the provision that calls for such construction. Besides, nothing can be clearer than that the record is for the benefit of any one who may desire to inspect it, because it is expressly provided for such.

It is contended by the appellee that a mere attachment of stock should not have precedence over a prior assignment, not made of record, because the attaching creditor has expended nothing but his labor and the costs. By way of argument, it is said that an attachment does not take precedence of an unrecorded deed. But such a case differs in this. The statute expressly requires transfers of stock to be recorded; it does not require that deeds shall be.

Stock in an incorporated company is personal property. Transfers of personal property, to be valid as against attaching creditors, should be attended by a visible change of possession, or else evidence of the transfer should be spread upon a public record. We have an express provision of statute for property where a visible change of possession can be made. In the case of stock in an incorporated company, no visible change of possession can be made. Stock is a share in the interests and rights of the corporation. Certificates are mere evidence. They may never be issued. It is not essential that they should be. When issued, they are merely for convenience. The object of the imperative provision that transfers of stocks shall be recorded unquestionably is that the ownership may be made apparent.

Chief Justice Shaw, in Fisher v. Essex Bank, 5 Gray, 373, (380), in speaking of stock in an incorporated company, said: "It is of importance that the title be certainly and easily ascertained, that the mode of acquiring and alienating it may at any time be made available by process of law for the debts of the owner." Again, speaking of the necessity of a record of the transfers as passing title, and of a levy according to the record, he says: "The shares [otherwise] could never be attached, for the officer could have no means of obtaining possession of the certificate from a reluctant debtor adversely interested, and without it the shares might pass the next day to a purchaser without notice." Again he says: "It is necessary to fix some act, and some point of time, at which the property changes, and rests in the vendee; and it will tend to the security of all parties concerned to make that turning point consist in an act which, while it may easily be proved, does at the same time give notoriety to the transfer."

In support of the conclusion which we have reached, that the statute

in question was designed in part for the benefit of attaching creditors, we will refer to another provision of the statute. The sheriff must, as nearly as the circumstances will permit, levy upon property fifty per cent greater in value than the amount of the debt as sworn to. Code, § 2954. Now, if the construction contended for by the appellee is correct, the attaching creditor and sheriff, proceeding strictly according to law in attaching stock, and exhausting their ability to secure the debt by such attachment, cannot know whether any security at all has been obtained. The certificate holder may keep himself concealed until the very moment when the stock is offered for sale on execution, and it is sufficient if he then appear, and give notice of his claim. We cannot think that the statute was designed to admit such a result. We may say, indeed, that the very mode of attaching stock provided by statute seems to be a legislative construction of the statute in question.

We come, now, to inquire how the question stands upon the authority of adjudicated cases.

In Maine the statute provides that "a transfer of shares is not valid, except between the parties thereto, until it is so entered in the books of the corporation." The provision is identical with the provision of our own statute. In Skowhegan Bank v. Cutler, 49 Me. 315, a question arose as to whether an attachment would take precedence of an unrecorded assignment, and it was held that it would.

In Illinois it is provided that shares of stock in a corporation can be transferred only upon the books of the corporation. In People's Bank v. Gridley, 91 Ill. 457, a question arose as to whether the levy of an execution would take precedence of a transfer of shares not entered upon the books. It was held that it would. The action was brought to enjoin the sale on execution. The point was made that the execution creditor, who had merely levied, was not an innocent purchaser for value, and that, not being such, the transfer, though not entered upon the records, might be set up against him; but the court held otherwise. It is true, the Illinois statute differs a little from ours. It provides that transfers can be made only on the books of the company. It does not, like our statute, expressly provide that a transfer not entered upon the books will be good as between the parties to the trans-But the difference, in our opinion, is not material. The statute is the same in effect. It is well settled that, under a statute like the Illinois statute, a transfer not entered upon the books is good between the parties. The case, then, appears to be strictly in point.

The same view was taken in Sabin v. Bank of Woodstock, 21 Vt., \$53, and Cheever v. Meyer, 52 Id., 66. In the former case, Chief Justice Redfield said: "We entertain no reasonable doubt that . . . all persons unaffected with notice to the contrary are at liberty to act upon the faith of the title being where it appears upon the books of the company to be." In State Ins. Co. v. Sax, 2 Tenn. Ch. 507, Chancellor Cooper cites the case, and refers to it approvingly.

In Wisconsin the statute pertaining to the transfer of stocks is like

ours, and in Application of Murphy, 51 Wis., 419, 8 N. W. Rep., 419, a construction was put upon it which sustains the appellants in the case at bar. The court said: "We think that the meaning of the law is that all transfers of shares should be entered, as here required, upon the books of the corporation; and it is equally clear to us that all transfers of shares not so entered are invalid as to attaching or execution creditors of the assignors, as well as to the corporation and subsequent purchasers in good faith."

In Pinkerton v. Manchester & L. R. Co., 42 N. H., 424, (462), an attachment, made without notice of a prior transfer not entered upon the books, was held to take precedence of it. The court said: "As to goods and chattels in possession, a substantial change of possession is by our law essential when it can be had. In the case of stock, the natural and appropriate indication of ownership is the entry upon the stock record."

In Connecticut an attachment was upheld as against a prior assignment not entered upon the books. Northrop v. Newton & Bridgeport Turnpike Co., 3 Conn. 544.

It is claimed by the appellee that in New York, New Jersey and California it has been held otherwise; and it may be conceded that this is so, though we are not prepared to say that all the statutory provisions in those states bearing upon the question are quite the same as in this.

The case of $Black\ v.\ Zacharie$, 3 How., 483, is cited by the appellee. In that case language was used which might seem to support the appellee's position, but the case was essentially different from the one at bar. The attaching creditors had notice of the assignee's rights at the time the attachment was levicd.

The appellee also cites *Moore v. Walker*, 46 Iowa, 164. But the pretended attachment in that case was made before the assignment, and would unquestionably have taken precedence of it if it had been properly made; but it was not, and had no validity, regardless of any question of transfer. It was expressly held that the provision of statute now in question (section 1078, Code,) had no application to the case. The remark, then, in the opinion, in regard to the scope of that section, does not have the force of an adjudication.

There is no question in regard to the preponderance of authority. It is clearly on the side of the appellants. But we are not influenced more by this fact than what seems to be the plain language and intent of the statute, and the difficulty and uncertainty which would often attend securing debts by attachment of stock, if stock, as against attaching creditors, can be transferred by mere delivery of the certificates, and if the books provided expressly for inspection by such creditors are to serve especially the purpose of a false scent.

We think the judgment must be

Reversed.

OTTUMWA SCREEN CO. v. STODGHILL, SHERIFF.

1897. 103 Iowa, 437.1

ACTION IN EQUITY, to restrain the defendant sheriff from selling certain shares of stock. As to certain of the shares in controversy, the District Court found for the defendants; and, as to these shares, the temporary injunction was dissolved, and a special execution ordered to issue for their sale. Plaintiffs appealed.

W. S. Coen, for appellants.

Morris & Lowenberg, for appellees.

Kinne, C. J. It appears from the record that one Antrobus owned certificates of stock in the plaintiff company embracing eleven shares, and that the same were assigned in writing to one Thayer, and were by him deposited with the secretary of the company; that the Ottumwa Screen & Construction Company held a certificate for five shares of stock in plaintiff company, which, when issued, was by the holder deposited with plaintiff company, under an oral assignment, as collateral security for two notes which had been signed by the Ottumwa Screen & Construction Company, E. B. Jones and J. H. Antrobus. Other certificates are referred to in the record. As, however, the court found in plaintiffs' favor as to them, they need no further consideration. Fair, Williams & Co., having a judgment in their favor as plaintiffs, and against the Ottumwa Screen & Construction Company as defendants, caused an execution to issue thereon, and a levy thereunder to be made by the sheriff upon the shares of stock before mentioned. Plaintiffs claim that before the sheriff made the levy he had actual notice that the stock had been transferred as before stated. As to this the evidence is conflicting, though we think it preponderates in favor of plaintiffs' contention. No entry had been made of the transfer of said shares on the books of the company prior to the completion of said levy. It appears that when the shares were transferred they were deposited with the secretary of plaintiff company, where they had remained until levied upon; that where the assignment was in writing, it was attached to the certificate, and in case of oral transfer the company was also notified of it. Each of the certificates of stock contained this provision: "Transferable only on the books of said company, in person or by attorney, on surrender of this certificate." Plaintiffs claim that the transfers were made in substantial conformity to the statute, and that they were as effectual as if entered upon the books of the company. It is also said that, as the officer making the levy had actual notice of the transfer before said levy, the object of the statute was accomplished, and the creditor acquired no lien thereon superior to plaintiffs' lien. On the other hand, it is insisted that the statute provides that, except as between

¹ Statement abridged. - ED.

the parties, a transfer of shares not entered on the books of the company is invalid. The statute reads: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by and to whom transferred, the numbers or other designation of the shares and the date of the transfer. . . . The books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof. . . ." Code 1873, section 1078. The question before us is: Will a transfer made in any other way than that provided in the statute be effectual to transfer the shares as against a creditor of the transferor who has actual notice of such transfer? While this court has held that a transfer of shares not entered on the books of the company will not be valid as against an attaching creditor who has no actual notice of such transfer, the effect of actual notice in case it exists, has not been determined. Lumber Co. v. Batavian Bank, 71 Iowa, 270. In that case, in discussing the meaning of the statute, it was incidentally said: "If attaching creditors of the transferor had knowledge of the transfer, it may be that a court of equity would protect the transferee's rights. It has frequently been so held, but that question is not before us." We think the statute should be construed to mean just what it says. We are not authorized to insert another exception in the statute, which, in effect, we must do if we hold that the attachment lien is not superior to the claims of plaintiffs. Plaintiffs construe the statute as if it read: "The transfer of shares is not valid except as between the parties thereto, and except as between the transferee and an attaching creditor of the transferor who has actual notice of the transfer." That would be ingrafting upon the statute an exception it does not contain. The holding in the case just cited is followed in Moore v. Opera House Co., 81 Iowa, 45. The case of Bank v. Haney, 87 Iowa, 106, relied upon by appellants, does not involve a transfer of stock, and has no application to the question here presented. The precise question before us was determined in the case of Bank v. Hastings, 7 Colo. App. 129 (42 Pac. Rep. 691). The statute of that state provides that "no transfer of stock shall be valid for any purpose, except to render the person to whom it shall be transferred liable for the debts of the company, unless it shall have been entered in the proper book of the company within sixty days from the date of the transfer, by an entry showing to and from whom it was transferred." General Statute, section 269. It was held that the requirement of the statute was absolute, and that the actual notice or knowledge of a creditor that a transfer had been made before his levy amounted only to knowledge that the transferees had, by their neglect to have the transfer entered upon the proper books, lost their right to the stock, and that it belonged to their transferor, and was subject to attachment at the suit of his creditors. Now, the right of an attachment or execution creditor to

take shares appearing in his debtor's name upon the company's books is derived from the act of the legislature, and we do not discover upon what principle courts can deprive a creditor of such right simply because he or the sheriff had actual notice of a transfer of the stock before the levy was made, when no such exception is to be found in the statute. 1 Morawetz, Corporations, section 199. Under statutes in effect like ours it has often been held that all transfers not entered on the books of the corporation are absolutely void, not because they were without notice, but because made so by statute. In re Murphy, 51 Wis. 519 (8 N. W. Rep. 419); Bank v. Cutler, 49 Me. 315; Weston v. Mining Co., 5 Cal. 186; Bank v. Folsom, 7 N. M. 611 (38 Pac. Rep. 253). The statute provides that a transfer of stock shall not be valid, as to third parties, until it is regularly entered on the books of the company. Its language is explicit. It points out just what must be done to protect the purchaser of stock in his holding as against the claim of creditors of the seller. Its meaning is obvious, and no argument is needed to show the wisdom of its provisions. What might be the rule in case a transferee had exhausted all reasonable means in attempting to procure the officers of a corporation to make the proper entries of a transfer on their books, and they had failed and refused so to do, we need not determine, as no such case is before us. The provisions of the statute requiring an entry in the books of the company is imperative, and in no wise affected by the fact that the creditor seeking to obtain a lien upon the stock, or the officer holding the process, may have actual notice of the transfer before the levy is made.

Decree affirmed.

CONTINENTAL NAT. BANK v. ELIOT NAT. BANK.

1881. 7 Federal Reporter, 369.

U. S. CIRCUIT COURT. District of Massachusetts.

Lowell, J. R. B. Conant was the cashier of the Eliot National Bank, of Boston, and owned 158 shares of its capital stock. Each of his certificates contained these words: "Transferable only on the books of the bank by the said Conant, or his attorney, on the surrender of this certificate." The Continental National Bank, of New York, was the regular correspondent of the Eliot Bank. In April and May, 1877, Conant borrowed \$9,500 of the Continental Bank, in two sums of \$5,000 and \$4,500, and sent them as collateral security certificates for 95 shares of stock of the Eliot National Bank, with a power of attorney to transfer them upon the books, but they were not so transferred. The by-laws of the bank provide that the stock shall be assignable only on the books; that when stock is transferred the certificate shall be returned to the bank and cancelled, and a new certificate issued. In July, 1878,

Conant confessed to the directors of the Eliot Bank that he had embezzled the funds of the bank to the amount of about \$70,000. They required him to resign his position as cashier, which he did, and he has since been convicted, and is now serving a sentence of imprisonment for his fraud. The Eliot Bank attached his shares in an action which is still pending in the superior court for Suffolk county. Afterwards the Continental Bank sent to the Eliot Bank the certificates and powers of attorney, and demanded a transfer and new certificate, which was refused. This bill is filed to require the transfer to be made, or for damages, or other relief. Conant is made a defendant, and the bill as against him has been taken pro confesso. The officer is likewise a defendant, but it is admitted that no decree can be made against him.

The only question of fact in dispute is whether the Eliot Bank, before attaching the shares, had notice that they had been pledged, or mortgaged, to the complainants. Conant testifies that at the meeting of the directors at which he confessed his misdoings, he was asked what assets he had, and mentioned certain shares of mining stock, and other things; and that the president asked about these bank shares, and was informed of the fact that they were pledged to the New York banks for their face value. Conant, soon after leaving the directors' room, consulted Mr. Morse, an attorney of this court, who went at once and saw the directors before they had left the bank; and he testifies that he was told there by some one or more of them that this stock was pledged. On the other hand, none of the directors remember such a conversation; and some of them are confident that none such can have occurred. If it occurred, it is admitted that the attachment could not hold because the attaching creditor had notice of the transfer. Black v. Z icharie, 3 How. 483.

I am inclined to think that the affirmative evidence must prevail in this case; but there is so much doubt in my own mind, that I have thought best to examine the disputed question of law, whether the attachment would take precedence if made without notice to the attaching creditor of the unrecorded transfer.

The arguments have been very thorough on both sides, and a great many cases have been cited. It has been very ably urged that by the law of Massachusetts the attachment would have the preference. This I consider doubtful; but the decision does not depend upon the law of Massachusetts.

1. It is not important to consider whether the contract was consummated in Massachusetts or in New York. The negotiability or transferable quality of the stock of a national bank depends upon the laws of the United States. Dickinson v. Central National Bank, 129 Mass. 279. In Merchants' Bank v. State Bank, 10 Wall. 604, the admitted law and usage of Massachusetts, where both the national banks were situated, and where the transactions took place, were wholly disregarded by the majority of the supreme court. The negotiability of foreign scrip in England is not governed by the law of England, but by the law of the foreign country, which may be proved by the general usage

of brokers and others dealing with such scrip. Goodwin v. Robarts, 1 App. Cases, 476. The time and mode of attaching property, and its effect in general, are part of the law of the forum; but its operation upon unrecorded transfers of shares in national banks is regulated by the law which creates the shares and provides for their conveyance and registration. That law is section 5139, Rev. St., which provides that shares may be transferred on the books of the association in such manner as may be prescribed by the by-laws or articles of association. Such a law, in Massachusetts, might possibly mean that creditors could attach the shares as the property of the recorded owner. Blanchard v. Deedham Gas-light Co. 12 Gray, 213. I have already said that I doubt if this is now the law of Massachusetts, and I shall return to the subject presently; but that law favors attachments in certain classes of cases to an unusual extent.

2. It is a general rule that creditors, whether they proceed by an attachment on mesne process, seizure on execution, creditor's bill, or through an assignee in bankruptcy, must take their debtor's property subject to all equitable as well as legal charges, liens, or opposing titles. Willes, J., in giving judgment in the Queen's Bench in 1868, in a case quite analogous to this, against the right of seizing shares of the apparent owner, said that it was a rule applied by that court more than a hundred years before, in the analogous case of the statutory execution under the bankrupt law, that the creditors can have no more than a debtor was entitled to in equity or at law. Pickering v. Ilfracombe Ry. Co. L. R. 3 C. P. 235, 251.

It has been the law of the lord mayor's court in London, from the time of Richard I., that an equitable assignment of a chose in action should prevail against an attachment. Westoby v. Day, 2 E. & B. 605. This application of the rule obtains in Massachusetts, and in the United States generally, though a few courts hold otherwise. Drake on Attachments, c. 24; Thayer v. Daniels, 113 Mass. 129, and cases cited.

The doctrine is so familiar that I will merely cite authorities to show that it is the general rule in Massachusetts as well as elsewhere. The exceptions to it in this state I will consider afterwards. See Wakefield v. Martin, 3 Mass. 558; Dix v. Cobb, 4 Mass. 508; Kendall v. Lawrence, 22 Pick. 540; Kingman v. Perkins, 105 Mass. 111; Thayer v. Daniels, 113 Mass. 129; Boston Music Hall Ass'n v. Cory, 129 Mass. 435.

3. The incorporeal property of the shareholder in a company of this sort is represented by his certificates; and, if these are conveyed, the failure to record the conveyance is not evidence of such a constructive fraud as sometimes arises from the possession of chattels after the property has been parted with. On the contrary, it was proved in early cases to be the usage, and is now adopted by the courts as law based on such usage, that the possession of the certificates, with a power to transfer them is prima facie evidence of title; and if, in fact, the possessor has given value, his title cannot be impeached even by

subsequent purchasers who did not receive the certificates, much less by creditors of the transferrer. In late cases these certificates are likened to bills of lading and other quasi negotiable securities. See Black v. Zacharie, 3 How. 483; Bank v. Lanier, 11 Wall. 369; Johnson v. Laflin, (S. C. U. S.) 12 Cent. L. J. 440; U. S. v. Vaughan, 3 Binney, 394, approved in U. S. v. Cutts, 1 Sumn. 133; Finney's App. 59 Pa. St. 398; Wood's App. 10 Weekly Rep. 125; Smith v. Crescent City Co. 30 La. Ann. 1378; Bridgeport Bank v. Schuyler, 34 N. Y. 30; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Winter v. Belmont Mining Co. 53 Cal. 428; Fraser v. Charleston, 11 S. C. 486; Strong v. Houston R. Co. 10 Weekly Rep. 28; Broadway Bank v. McElwrath, 13 N. J. Eq. 24; S. C. 24 N. J. Eq. 496; Prall v. Tilt, 28 N. J. Eq. 483; Merchants' Bank v. Richards, 6 Mo. App. 454; Conant v. Seneca Co. Bank, 1 Ohio St. 298; Duke v. Cahawba Navigation Co. 10 Ala. 82; Ross v. S. W. R. Co. 53 Ga. 514.

In many of the foregoing cases there were laws providing for the transfer of shares upon the books of the company. But the courts held that this registration was intended chiefly for the convenience of the company, to enable it to know who should have dividends and who should vote. No doubt it is sometimes intended as a record of persons liable for the debts of the company, and is so in the case of national banks; but the great weight of authority is that it is not intended for the benefit of creditors of the individual shareholders. Some of the courts hold that the unrecorded transfer passes only an equitable title; others, that it gives a legal title. I assume that by the decisions in the courts of the United States only an equitable title is acquired. That point is unimportant.

4. The statutes of many, perhaps of most, of the States, provide that certain conveyances of land and of chattels shall be recorded, and that until record is made a conveyance shall have no effect excepting between the parties, and, in most cases, those having actual notice. An attaching or seizing creditor, without notice of a prior conveyance, is, undoubtedly, within the words of these statutes; and so such creditors have come to be treated, and even spoken of, as in some sort purchasers. A few of the statutes requiring registration of the shares of companies follow the exact language of these registry laws, and declare that no unrecorded title shall be good, or only against persons having In California, even, such a law is held not to avail creditors, (Winter v. Belmont Co. 53 Cal. 428;) but in Maine and Massachusetts, the decision, and perhaps the better one, is that such a law must be construed like other similar registry laws. Skowhegan Bank v. Cutler, 49 Me. 315; Rock v. Nichols, 3 Allen, 342. It was in this state of things that the case which is the support of the defence here was decided. In Fisher v. Essex Bank, 5 Gray, 373, the charter of a bank incorporated in Massachusetts provided that the shares should be transferred only at the banking house, and upon the books of the company, and the court held that an attaching creditor could hold against an earlier unrecorded

transfer for value. I have studied this decision with care. It seems to proceed upor the theory that by the charter, which is a public statute, there can be no such thing as an equitable transfer, or, at any rate, none except by a sort of equitable estoppel between the parties, and that it was a part of the intent of the act that a creditor at law should have the legal right to attach the legal title. This decision has been followed in Illinois, (People's Bank v. Gridley, 91 Ill. 457,) but rejected in the other states, so far as their courts have passed upon it. It is sometimes spoken of as being the law of Connecticut and Vermont, but the early cases in the former state are much modified by Colt v. Ives, 31 Conn. 25. The case cited from Vermont (Rice v. Curtis, 32 Vt. 464) is not in point. It is opposed directly to many of the cases already cited under the third point, and to the general principle that attaching creditors are bound by all equities, including equitable estoppels. It has, moreover, been seriously modified, if not wholly overruled in Massachusetts, in Dickinson v. Central Nat. Bank, 129 Mass. 279, printed, but not yet published. The Central National Bank had a by-law like that now in question, and A., the owner of ten of its shares, had transferred them by way of security, precisely as Conant transferred his shares, and afterwards became bankrupt. The transferee, still later, sold the shares at public auction, under his power, after due notice to A. and to his assignee. The bank, notwithstanding a notice and demand by the assignee in bankruptcy, transferred the shares to the purchaser. The assignee sued the bank for damages, but was defeated. Colt, J., delivering the opinion of the court, says that Fisher v. Essex Bank, ubi supra, does not apply, because in that case the charter had the force of a general law, but that a by-law has no such effect, (citing Sargent v. Essex Marine R. Co. 9 Pick. 201,) and that in the absence of such a general law the transferee took an equitable title which should prevail against the assignee in bankruptcy of the transferrer. The only circumstances in Fisher v. Essex Bank, not found in Dickinson v. Central Bank, are these: (1) The law in the former case contained the word "only"—that the shares should be transferred only so and so; (2) that an attaching creditor and not an assignee in bankruptcy was concerned; (3) that the law governing the company was a Massachusetts law, which might be differently construed from a national banking act. The first and third points, of course, are the same in this case as in the later one in Massachusetts. The second is not sound in this court; an assignee and attaching creditor stand precisely alike, according to the law which governs this controversy.

5. The doctrine of *Dearle* v. *Hall*, 3 Russ. 1, confirmed in *Foster* v. *Cockrell*, 3 Cl. & Fin. 466, is much relied on by the defendants. This doctrine is that of two innocent purchasers of merely equitable interests he shall be preferred who first gives notice to the trustee or holder of the legal title. To this there are several answers: 1. Though the corporation is for some purposes a trustee for the shareholders, the latter have an independent legal property in their shares which they can con-

vey, and whether their actual conveyance is legal or equitable is of no consequence. 2. The doctrine applies in England only to purchasers, and not to creditors seizing or attaching, even though a statute gives a right to seize all shares standing in the debtor's name in his own right. This statute was once held by the Queen's Bench to mean that the creditor might seize what the register showed to be apparently the property of the debtor, (Watts v. Porter, 3 E. & B. 743;) but this has been overruled, on the ground that the legislature cannot be supposed to have intended to take one man's property for another man's debt, without the most explicit statement of such a purpose; and therefore the "right" refers to the equitable as well as legal right. Dunster v. Lord Glengall, 3 Ir. Ch. 47; Scott v. Lord Hastings, 4 K. & J. 633; Beavan v. Earl of Oxford, 6 D. M. & G. 524; Eyre v. McDonald, 9 H. L. 619; Robinson v. Nesbitt, L. R. 3 C. P. 264; Pickering v. Ilfracombe Railway Co. L. R. 3 C. P. 235; Gill v. Continental Gas Co. L. R. 7 Ex. 619.

A few courts in this country have carried the doctrine of Dearle v. Hall so far as to uphold the garnishment of a non-negotiable debt which had been equitably assigned without notice. We have already seen that this is not the law in England nor in Massachusetts. Neither is it the law of the United States generally. Drake, Attachments, c. 24; Cornick v. Richards, 3 Lea. 1. The supreme court of Tennessee in that case refused to extend the rule to shares of stock, though it applies in that state to choses in action. As shares are not choses in action, and as attaching creditors are not purchasers, Dearle v. Hall is not in point.

6. It remains only to cite two decisions of the supreme court, which, in principle, are decisive of this case. In Bank v. Lanier, 11 Wall. 369, a national bank was required to make good to the holder of an unrecorded certificate the value of his shares, although they had been transferred on the books to a subsequent purchaser for value. That purchaser, to be sure, was not before the court, but if his title was better than that of the plaintiff, the bank was justified in transferring the shares and would have had a perfect defence. Dickinson v. Central Nat. Bank, 129 Mass. 279; Gill v. Continental Gas Co. L. R. 7 Ex. 232. If a purchaser for value could not hold against the holder of the unrecorded certificate, a fortiori of an attaching creditor.

Bullard v. The Bank, 18 Wall. 589, is in the same line of thought. It decides that certificates of shares in national banks are so far negotiable, or quasi negotiable, that a by-law of the bank, which undertakes to make them subject to the debt of the transferrer to the bank itself, is void. On the same ground it was held that a by-law like that of the Eliot National Bank, if intended to give attaching creditors a better title than transferees who had not recorded their certificates, was void. Sargent v. Marine Ry. Co. 9 Pick. 201. Here, again, the argument is a fortiori. If the bank cannot create a lien by its by-law, much less can it obtain one indirectly, by attachment, upon the construction of an ambiguous by-law.

My conclusion is that the attachment of Conant's shares cannot prevail against the complainants' earlier title, whether that is equitable or legal. There is no conflict of jurisdiction, because no state court or officer has taken possession of anything. The question is merely one of title. A bill in equity will lie, because the complainant company has, or might have, a right to require the shares to be transferred to it. As values are at present, it would be more just to enter a decree for the debt due the complainants, and interest, which would leave a considerable value for the defendant bank if the present market price holds. I understood counsel to say that the precise form of the decree could probably be agreed on.

Decree for the complainants.

A corporation has no implied lien on its shares for calls or other debts owing from its shareholders, and consequently no implied right to refuse to register a transfer because the transferrer is indebted to it. . . .

As to whether a corporation has the implied power to pass a by-law giving itself a lien on its shares for the holders' indebtedness to it, the authorities conflict. A number of decisions hold it competent for a corporation to pass such a by-law, and the preponderance of authority is certainly to the effect that a general power possessed by a corporation to regulate the transfer of its shares authorizes it to create by a by-law a lien on them in its own favor. But even this last proposition has been disapproved; and many cases strenuously deny any implied power in a corporation to pass a by-law which creates a lien on its shares, or in any material way interferes with their transferability. But in order to decide some of the cases where the opinion of the court in terms denies the power of a corporation to pass a by-law of this character, it was only necessary to hold (what those cases also hold with perfect justice on their side, and little or no authority against them), that the rights of a person purchasing shares without actual notice of such a by-law are not affected by it. Taylor on Corporations, 3d ed. ss. 600, 601.1

[As to remedy against a corporation by a stockholder whose certificate has been lost or destroyed; see Galveston City Co. v. Sibley, A. d. 1882, 56 Texas, 269; State, ex rel. Seaton, v. New Orleans & C. R. Co., A. d. 1899, 51 Louisiana Annual, 909; Lowell on Transfer of Stock, ss. 128, 241. — Ed.]

¹ It is held, that a national bank is prohibited by the terms of the National Banking Acts from reserving a lien on the shares of its stockholders. See cases cited in notes to 1 Morawetz, 2d ed., s. 201, and in notes to Taylor, 3d ed., s. 602; also Buffalo German Ins. Co. v. Third National Bank of Buffalo, 162 New York, 163.—ED.

CHAPTER XVII.

FORFEITURE OF CHARTER—HOW ENFORCED. SUIT BY STATE, OR BY CITIZEN, TO RESTRAIN *ULTRA VIRES* ACTS, OR TO COMPEL PERFORMANCE OF CORPORATE DUTIES.

HEARD v. TALBOT.

1856. 7 Gray, 113.1

Complaint under Rev. Sts. c. 116, for flowing land by the water of Concord River, raised by the respondents' dam in the operation of their mills. Respondents claim the right to now maintain the dam without payment of damages, as the grantees of the corporation, styled the Proprietors of the Middlesex Canal. The corporation was chartered in 1793 to build a canal. In 1798 an additional act authorized the Proprietors to purchase and hold any mill seats on the waters connected with their canal, and to erect mills thereon. The charter provided that persons whose lands were flowed might obtain compensation by applying to the Court within one year from the time of the damage done. The Proprietors, so long as they were in active operation as a ' canal company, leased and sold water power to divers persons, to be drawn from the head of water raised by the Proprietors' dam, and to be used in subordination to the use of the water for feeding the canal. In 1826, the Proprietors built the present dam, by which the plaintiff's land is now flowed. In 1840, the plaintiff's ancestor applied to the Court to obtain compensation for flowage. The petition was dismissed; the Court holding that the damage was "done" when the dam was completed, and that no application could be made after one year from that time had elapsed. (Heard v. Proprietors, 5 Metcalf, 81.)

In 1851, the canal was wholly disused by the Proprietors, and filled up in parts of it; and it has now become wholly unfit for use, and is no longer filled with water, and is wholly unused by the Proprietors.

At the time of the abandonment of the use of their canal, and as a part of the winding up of their affairs, the Proprietors sold all their land and the residue of the water power by them unsold, raised by their dam aforesaid, to the respondents by deed of quitclaim, "subject expressly to the reservation of all easements and services necessary for princident to the preservation and use of said canal for the purpose of

¹ Statement abridged. Argument omitted. - ED.

navigation, and of all the rights of the public therein, until the same shall be lawfully discontinued"; and the respondents have since that sale maintained and kept up the water by said dam for manufacturing purposes, and claim to use the same in such manner and to such extent as may suit their convenience for such manufacturing purposes, subject to said reserved right of said canal.

After abandoning the canal, and after the deed to the respondents, the Proprietors applied to the legislature for leave to wind up their affairs, and to sell their land and water power, and surrender their charter, which application was denied. Subsequently they petitioned the Supreme Court for leave to wind up their affairs and surrender their charter; which petition is still pending.

B. F. Butler, for plaintiff.

J. G. Abbott, for respondents.

BIGELOW, J. There can be no doubt, that the proprietors of the Middlesex Canal, under their original act of incorporation, St. 1793, c. 21, and under the additional act of 1798, c. 16, by which they were empowered to purchase and hold mill seats on the waters connected with their canal, acquired, as part of their franchise, the right to flow the land of the complainant; and that this right was in its nature a permanent easement or servitude, for which the complainant or those under whom he claims title had an ample remedy in damages provided in the third section of the original charter of the corporation. That remedy was an exclusive one, and the time within which parties could legally avail themselves of it has long since passed away. These points have already been adjudicated. Stevens v. Middlesex Canal, 12 Mass. 466. Sudbury Meadows v. Middlesex Canal, 23 Pick. 36. Heard v. Middlesex Canal, 5 Met. 81.

It seems to us very clear that there is nothing in the facts of the present case to take it out of the principles settled by those decisions, and that there is no ground on which the claim of the complainant to damages under the mill act can be sustained against these respondents. They hold their title to the mills and water power raised by the dam which causes the land of the complainant to be flowed, under a grant from the Proprietors of the Middlesex Canal. By the deed under which they claim, the right is expressly reserved to the grantors to appropriate the water raised by the dam at all times to the purpose of supplying their canal. It is therefore in the right of the canal corporation, and subject to this reservation, that the respondents claim to use and enjoy the mill privileges created by the dam which is the subject of this complaint. Unless, therefore, the corporation have surrendered or lost the right to keep up and maintain this dam, it having been already settled in 5 Met. 81, that the complainant has no claim for damages on account thereof against the corporation, it would seem to follow that he has none against these respondents, who claim under the corporation.

The sole ground on which he now rests his case is, that the canal

corporation have since the year 1851 wholly disused their canal, filled up portions of it, and suffered it to remain in such condition as to be entirely unfit for use. The argument is, that the right of erecting and maintaining a dam was granted to the corporation mainly for the purpose of enabling them to raise water for the supply of their canal, and the power to hold mills was wholly incidental to and dependent on the appropriation and use of the water raised by the dam for the great object for which the corporation was established and their franchise granted; that the corporation, having abandoned the use of the canal, and ceased to supply it with water, can no longer claim the right, under their charter, to maintain the dam.

Admitting, for the sake of giving full force to this argument, the correctness of the premises on which it rests, we do not think the conclusion drawn from them legitimately follows. An essential link in the chain of reasoning is wanting. The argument assumes that the neglect or omission to use a right granted to a corporation, as part of their franchise, for the specific purpose for which it was given, necessarily works a forfeiture of the right itself. | But this is not so, unless the right is expressly made conditional on the use, which is not done in the act incorporating the proprietors of the canal.) The right is given absolutely, and without express condition or limitation. The corporation are still in existence. All the rights and powers conferred on them by law, and comprehended within the broad terms of their franchise, have never yet been legally forfeited or extinguished. Nor can they be, except by a surrender of the charter and its acceptance by the government, or by a forfeiture declared by the judgment of a competent tribunal, or by proceedings under St. 1852, c. 55.

In the absence of express conditions in an act of incorporation, by which corporate rights and powers are made to depend on their due exercise, a nonuser or misuser of them does not operate as a surrender or forfeiture of the charter. Although the disuse of the canal and its abandonment by the corporation may be a gross disregard of the duty imposed on them by law, and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of the charter, and, upon due proceedings had, might be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of an act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the government from which they derive their powers. Individuals therefore cannot take it upon themselves in the assertion of private rights, to insist on breaches of the contract by the corporation, as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings duly instituted against the corporation. It would not only be a great anomaly to allow persons, not parties to a contract, to insist on its breach and enforce a penalty for its violation; but it would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person, who might be aggrieved by their exercise. Therefore it has been often held, that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government. Angell & Ames on Corp. § 777, and cases cited. Boston Glass Manufactory v. Langdon, 24 Pick. 49. Quincy Canal v. Newcomb, 7 Met. 276.

It follows from these principles, that the franchise of the Proprietors of the Middlesex Canal, which includes the right of keeping up and maintaining the dam which flows the land of the complainant, being still in existence, it is not competent for him in this proceeding to show a nonuser or abandoument of the canal, as a ground for denying the right of the corporation to continue the dam; and as the respondents hold their title under the corporation, and justify the flowing of the complainant's land under the corporate franchise, there is no ground for sustaining the present complaint under the mill act against the respondents. It is a sufficient answer to this suit, that the corporation have the legal right to maintain the dam as against the complainant, without payment of damages.

This view of the case renders it unnecessary to determine the question discussed at the bar, whether the right to purchase and hold mills, which was conferred on the corporation by the act of 1798, was the grant of an additional and distinct franchise or right, which may be used and enjoyed by the corporation or their grantees separately from and independently of the building and maintaining of a canal; or whether it was merely secondary and subordinate to the making of a canal and the raising of water for its supply, and was to cease and become extinguished when the right of keeping and using the canal should be surrendered or forfeited. Nor have we occasion to decide whether the forfeiture or extinguishment of the charter of the corporation would operate to defeat the title of the grantees of the corporation to the mills and water power which had been acquired by the corporation lawfully, and conveyed to the respondents by deeds valid at the time they were made, by which the title became vested before such extinguishment or forfeiture took place. These are important and interesting questions; but it will be quite time enough to settle them, when the exigency of a case shall require, in order to adjudicate upon the rights of parties, that they should be judicially determined.

Complainant nonsuit.

WALLAMET, &c. CO. v. KITTRIDGE.

1877. 5 Sawyer (U. S. Circuit Court), 44.1

U. S. Circuit Court. District of Oregon. Before DEADY, DISTRICT JUDGE.

Action upon a bond, conditioned for the performance of a contract.

Defendants, among other defenses, pleaded: —

2. That on May 1, 1876, the plaintiff ceased to carry on the business for which it was formed, and has not since transacted or carried on any of such business, and has ceased to exist.

Plaintiff demurred.

The above plea is founded on section 16 of the corporation act (Oregon Laws, p. 528), which provides that if any corporation organized thercunder, "shall for any period of six months after the commencement of its business, neglect and cease to carry on the same, its corporate powers shall also cease."

William Strong, for plaintiff.

Charles B. Upton, for defendant.

DEADY, J. [After stating the case.] It is admitted by counsel for the defendant that a forfeiture of the plaintiff's corporate powers cannot be set up to defeat this action. But it is claimed that the non-existence of a corporation may always be pleaded to an action professed to be brought by it; as that it was never duly created or had ceased to exist by lapse of time; and that under the provision cited from section 16, supra, whenever a corporation neglects to use its powers for any one period of six months it ceases to exist, the same as if its corporate life had then expired by lapse of time.

But in my judgment the language — "its corporate powers shall cease," is the substantial equivalent of the phrase "its corporate powers shall be forfeited." In either case the statute does not execute itself. An inquiry must be made to ascertain whether the corporation has kept the conditions subsequent upon which its creation was authorized and permitted. If there has been a failure to keep any such condition no one can allege it or take advantage of it but the State which created or authorized the corporation. In this respect a corporation is like an estate in fee. If a condition subsequent is annexed to such an estate, no one but the grantor or his successors can take advantage of its non-performance. (Schulenberg v. Harriman, 21 Wall. 63.) Upon the question of whether the words - "its corporate powers shall cease," import a forfeiture of the corporate existence rather than an actual termination of the same, as by lapse of time, the case of Lessee of Frost et al. v. Frostburg Coal Co., 24 How. 283, is in point. There the law provided that in case four fifths of the capital

¹ Statement abridged. Only so much of case is given as relates to one point. -- En

stock of a corporation became concentrated in the hands of less than five persons "the corporate powers and privileges shall cease and determine," and it appearing that the stock of the corporation defendant was so owned, the court held that it was a cause of forfeiture of which a private party could not take advantage; saying, "That is a question for the sovereign power, which may waive it or enforce it at its pleasure." In Chesapeake etc. Canal Co. v. Ohio R. Co., 4 Gill & John. 1, it was held that a violation of a provision in a charter of a corporation, to the effect that on a breach of a certain condition such corporation should not be entitled to any privilege under the act of incorporation, and that all its interest thereunder should be forfeited and cease, did not ipso facto work a dissolution of the corporation. See, also, to the same effect, The People v. The Manhattan Bank, 9 Wend. 382; Bradt v. Benedict [17 New York] 93; Mickles v. Rochester Bank, 11 Paige, 118. That this provision in section 16, supra, concerning the non-user of corporate powers, is a condition subsequent and not a limitation upon the existence of the corporation, is further shown by the Code of Civ. Pro., which provides (sec. 353, sub. 4) that an action may be maintained in the name of the state "for the purpose of avoiding the charter or annulling the existence of such corporation, . . . whenever it has forfeited its privileges or franchises, by failure to exercise its powers."

Here, the state has provided a direct judicial proceeding to annul the existence of a corporation which has failed to exercise its powers for such a period and under such circumstances as causes a forfeiture of its privileges — the very case described in section 16, supra. Indeed, this declaration of the statute is simply intended to define and make certain what kind and duration of neglect or non user of the corporate powers shall be a sufficient cause of their forfeiture. Without the statute the question in each case was involved in the uncertainty of determining whether, under all the circumstances, the neglect was wilful and material. (A. & A. on Cor. 776.) But now the statute furnishes a certain and prescribed rule. A neglect to exercise the powers of the corporation for six months works a forfeiture without reference to the cause or consequence of such neglect. But this action can only be brought in the name of the state and upon leave granted by the judge of the court. Neither the forfeiture nor the fact of non-user can be set up by a private person for any purpose. It must first be judicially ascertained and declared on the complaint of the state. (A. & A. on Cor., sec. 777.) The demurrer to this defense is sustained.

[Remainder of opinion omitted.]

Belcher, J., in OAKLAND R. CO. v. OAKLAND, BROOKLYN &c. R. CO.

1873. 45 California, 365, pp. 373, 374, 378.

Conceding that the plaintiff's grant was upon condition subsequent, still it does not follow that its right in that part of the street where it had not constructed a road could be determined only by a judgment of forfeiture.

The grant was of a franchise, which had the legal character of an estate or property. "An estate," said Chancellor Kent, "in such a franchise and an estate in land rest upon the same principle, being equally grants of a right or privilege for an adequate consideration." 3 Kent's Com. 458.

Now, while a forfeiture at common law does not operate to divest the title of the owner until by a proper judgment in a suit instituted for that purpose the rights of the State have been established, it is otherwise when the forfeiture is declared by a statute. In the latter case the title to the thing forfeited immediately vests in the State upon the commission of the offense or the happening of the event for which the forfeiture is declared, or at such other time and upon such other condition as the statute may name. The authorities to this effect are numerous and uniform.

"It has been proved," said Marshall, C. J., "that in all forfeitures accruing at common law nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense; but the distinction taken by the counsel for the United States between forfeitures at common law and those accruing under a statute is certainly a sound one. When a forfeiture is given by a statute the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately or on the performance of some particular act, as shall be the will of the legislature. United States v. Grundy, 3 Cranch, 151."

In this case it is clear that the legislature intended, by the restriction as to the time within which the plaintiff's work must be completed, that it should have no rights in the streets of Oakland if it failed to exercise them within five years. This intention was expressed in the most explicit terms, for, as we have seen, it declared that upon failure to comply with the provisions of the act, "then the franchise and privileges herein granted shall utterly cease and be forfeited." Not to give effect to this declaration would be to frustrate and defeat the legislative will.

BROOKLYN STEAM TRANSIT CO. v. CITY OF BROOKLYN.

1879. 78 New York, 524.1

Appeal from judgment in favor of defendant, rendered by General Term in the Second Department.

The action was brought by plaintiff, Aug. 31, 1878, to restrain defendant from interfering with the construction of its road in defendant's streets.

Plaintiff was incorporated by Chapter 940, Laws of 1871. Section 17 provides as follows: "This act shall take effect sixty days after the passage thereof; but unless said Brooklyn Steam Transit Company be organized, and at least one mile of such railroad, as it is authorized and empowered to construct under this act, be laid within three years thereafter, then and in that case this act and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated."

Under that act plaintiff was in some way organized. By a subsequent act of 1873, the time for the construction of the one mile of railroad was extended to July 4, 1876. The plaintiff did not build or lay any portion of its railroad until June, 1878, when it built a mile outside the city of Brooklyn, and commenced to lay foundations for a railroad within the city limits.

David Dudley Field, for appellant.

William C. De Witt, for respondent.

EARL, J. [After stating the case.] The claim of the defendant is that the plaintiff lost its corporate existence by not building one mile of its road before the expiration of the time limited, to wit, July 4, 1876.

The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter or to comply with its provisions does not ipso facto lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the attorney-general in behalf of the people; but it cannot be denied that the Legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter or default as to limitations imposed, and whether the Legislature has intended so to provide in any case depends upon the construction of the language used. Here the language used shows that the Legislature intended to make the continued existence of the plaintiff as a corporation depend upon its compliance with the requirements of section seventeen of the original act. In case of non-compli-

Statement rewritten. Arguments and part of opinion omitted. — Ep.

ance the act itself was to cease to have any operation, and all the powers, rights and franchises thereby granted were to be "deemed forfeited and terminated." There was to be not merely a cause of forfeiture which could be enforced in an action instituted by the attorney-general, but the powers, rights and franchises were to be taken and treated as forfeited and terminated. At the end of the time limited the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence. A precise authority for this construction of this statute is found in the case of the Brooklyn, Winfield and Newton Railroad Company (72 N. Y. 245). That company was organized under the general railroad act of 1850, as amended by the act, chapter 775 of the Law of 1867. By the last named act it is provided that "if any corporation formed under the general act shall not, within five years after its articles of association are filed and recorded, begin the construction of its road and expend thereon ten per cent on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association, as aforesaid, its corporate existence and powers shall cease." That company had not begun the construction of its road within the time limited, and it was held that it had lost its corporate existence, and the same view was emphatically reiterated when a similar case of the same company was again before this court (75 N. Y. 335). It was held that the statute executed itself, and that the intervention of the courts in an action instituted by the attorney-general was not necessary. The language of limitation used in section seventeen of the act of 1871, more plainly, if possible, indicates the legislative intention, that a failure to comply with the limitations should put an absolute end to the corporation, than the language used in the act

An effort was made upon the argument of this case by the learned counsel for the appellant to distinguish this case from the one cited, but we can perceive no material difference between the two cases. In that case the company was fully organized, as it was in this. That company had a corporate existence to lose, and so had this. It is probably true, that this company in making surveys and plans within the three years may have done more than that company did, but that is immaterial, so long as it failed to do the precise thing required by the statute. In that case the proceeding was to interfere with private property by the right of eminent domain. (Here this company was proceeding to occupy the public streets which were under the charge and control of the city. In the one case, as in the other, corporate existence and right were necessary to justify the act. The city must have as much right to question this use of its streets as a private owner would to question the use of his property. If a private owner could in such case question the corporate existence of the company, the city must have the same right. The fact that that company was organized under a general law, while this is organized under a special law, can make no difference. A corporation organized under a general law is upon precisely the same footing as one constitutionally organized under a special law which contains all the provisions of the general law. Nor can the fact that this company has already built one mile of its road distinguish this case from the one cited. If we are right thus far, it built that line without any authority, and it did not acquire thereby the right to enter the city and continue its wrongful acts there. But it is not necessary to determine in this case what the status of the plaintiff would have been if it had been operating its road upon the mile thus constructed. It is sufficient now to determine that it cannot wage an aggressive warfare either upon private property or the public streets of the city of Brooklyn without further or other legislative authority than it invoked upon the trial of this action.

[Remainder of opinion omitted.]

NEW YORK & LONG ISLAND BRIDGE CO. v. SMITH.

1896. 148 New York, 540.1

Condemnation Proceeding. An order appointing commissioners of appraisal was affirmed by the General Term in the First Department. The defendant Smith appealed.

De Lancey Nicoll, for appellant.

Julien T. Davies, and William J. Kelly, for respondent.

Bartlett, J. The main question presented by this appeal is whether the New York and Long Island Bridge Company was, at the time this proceeding was instituted, an existing corporation duly authorized to acquire title to the land of the defendant Smith, for the purposes of constructing the bridge and its approaches.

The learned counsel for the appellant rests his attack upon the corporate existence on various distinct grounds, and a proper consideration of them involves a full examination of the legislation under which the bridge company claims the right to maintain this proceeding.

The appellant takes a preliminary point which, if sound, would require a reversal of the order appealed from, and a dismissal of this proceeding.

The act incorporating the bridge company (Chap. 395, Laws of 1867), provides in the twelfth section thereof that the bridge shall be commenced within two years from the passage of the act, and shall be continued without unreasonable delay, until it is completed, "or this act and all rights and privileges granted hereby shall be null and void."

¹ Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to one point.—Ep.

It is the contention of appellant's counsel that this forfeiture clause is self-executing, and as it is admitted that the work was not commenced within two years from the passage of the act, the bridge company, ipso facto, ceased to exist.

We are referred to a large number of authorities as sustaining this position, and, among others, to several cases in this court.

It is to be observed that the question as to whether a forfeiture clause is or is not self-executing, depends wholly upon the language employed by the legislature.

Our attention is called particularly to In re Brooklyn, Winfield & Newtown Ry. Co. (72 N. Y. 245) and Brooklyn Steam Transit Co. v. City of Brooklyn (78 N. Y. 524).

In the first case the words of forfeiture were, "its corporate existence and powers shall cease," and this court held that upon default the corporation's existence and powers ceased, without judicial proceedings. In the second case the words of forfeiture were, "this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated," and this court held the clause to be self-executing, thereby recognizing the undoubted power of the legislature to provide that corporate existence shall cease by the mere fact of failure of the corporation to perform certain acts imposed by the charter.

It requires, however, strong and unmistakable language, such as each of the cases referred to presents, to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney-general.

In the case at bar the words of forfeiture are, "all rights and privileges granted hereby shall be null and void."

It cannot be said that the words "shall be null and void" disclose the legislative intent to make this clause self-executing. The words "null and void," as used in this connection, clearly mean voidable. The word "void" is often used in an unlimited sense, implying an act of no effect, a nullity ab initio (Inskeep v. Lecony, 1 N. J. L. 112); in the case at bar it was not so employed, but rather in its more limited meaning.

We think these words mean no more than if the legislature had said, in case of default the corporation "shall be dissolved." The attorney-general was authorized to treat the charter of the bridge company as voidable, and by appropriate legal proceedings to have terminated its corporate existence.

The Supreme Court of the United States, in passing upon the meaning of the words "void and of no effect," uses this language: "But these words are often used in statutes and legal documents, . . . in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. (Ewell v. Daggs, 108 U. S. 148.)"

Holding, as we do, that the forfeiture clause in the act of 1867 was not self-executing, we find in the various acts amending the act of 1867 repeated waivers by the legislature of the failure of the bridge company to begin its work within two years from the passage of the act of 1867.

[The learned Judge then referred to acts of 1871, 1879, 1885, and 1892.]

[Opinion on other points omitted.]

Order affirmed.

COMMONWEALTH v. UNION, &c. INS. CO.

1809, 5 Mass. 230.1

This was a motion for a rule upon the defendants to shew cause why the Solicitor General should not be directed to file an information in the nature of a quo warranto against them, that the said company might be dissolved, and their corporate powers be adjudged void. The motion was made by Sullivan in behalf of seventeen persons alleging themselves to be members of the corporation, . . .

Jackson, for defendants.

The Solicitor General, for the relators (but not appearing in his official character).

Parsons, C. J.

Informations of this nature are properly grantable for the purpose of enquiring into the election or admission of an officer or member of a corporation, when moved for by any person interested in, or injured by such election or admission, if the same was unduly made. And upon such information, if the election or admission was illegal, judgment of a motion might be entered, and a fine might also be imposed on the party who had usurped upon the commonwealth.

In this case the parties applying for the rule do not complain of any illegal election or admission, of any officer or member of the corporation: but the object of the application is to obtain a judgment of forfeiture of the franchises of the corporation, and a seizure of them by the commonwealth.

We are well satisfied that a corporation, as well when created by charter under the seal of the commonwealth, as by a statute of the legislature, may by nonfeazance or malfeazance forfeit its franchises, and that by judgment on an information the commonwealth may seize them. And if the allegations stated in the motion for the rule in this case were true, and the commonwealth had caused an information to

¹ Statement abridged. Arguments and part of opinion omitted. - ED.

be filed and prosecuted, for the purpose of seizing the corporate franchises for such malfeazance, judgment for those causes might have been rendered for the commonwealth.

But an information for the purpose of dissolving the corporation, or of seizing its franchises, cannot be prosecuted but by the authority of the commonwealth, to be exercised by the legislature, or by the attorney or solicitor general, acting under its direction, or ex officio in its behalf. For the commonwealth may waive any breaches of any condition expressed or implied, on which the corporation was created; and we cannot give judgment for the seizure by the commonwealth of the franchises of any corporation, unless the commonwealth be a party in interest to the suit, and thus assenting to the judgment.

This distinction between informations in the nature of a quo warranto, to impeach any election or admission of a corporate officer or member, and informations to dissolve a corporation is well settled, and upon sound principles of law.¹

Rule discharged.

STATE v. FOURTH N. H. TURNPIKE.

1844. 15 New Hampshire, 162.2

Information in the nature of *quo warranto*, filed by the Attorney General against the defendants, and charging them with usurping the privilege and franchise of maintaining a toll gate and demanding and receiving tolls.

The case came before the Court upon the state's demurrer to the defendants' rejoinder. Upon the pleadings the following facts appeared:

The defendants were incorporated in 1800, with power to maintain a turnpike road and collect tolls. Soon after incorporation, they built the road and established toll gates. The charter enacts, that, at the end of every six years after the setting up of any toll gate, an account of the expenditures and profits of the road shall be laid before the legislature, under forfeiture of the privileges of said act in future. No accounts were furnished until 1830. In 1830, 1836, and 1842, accounts were laid before the legislature, and were received by the legislature as sufficient and satisfactory. In 1833 an act was passed authorizing defendants to change the route of the road in certain towns. The defendants accepted this act, and changed the route at great expense.

^{&#}x27;Under the statutes of some jurisdictions, a private individual, whose private interest is specially affected by corporate acts, may maintain a proceeding to test the rights of a corporation to exercise a particular franchise. In at least one instance, the statute provides that an action to vacate the charter of a corporation may be brought by a private party in the name of the State, on leave granted by the court. The latter provision applies where the corporation has misconducted in certain specified ways.— Ed.

² Statement abridged. Arguments omitted. - ED.

Perley, for defendants.

Walker, Attorney General, for state.

GILCHRIST, J. The charter makes it the duty of the corporation to lay before the legislature, at the end of every six years after the setting up of any toll-gate, an account of the expenditures and profits of the road, under the penalty of forfeiting the privileges of the act in future. These accounts, however, were not submitted until the years 1830, 1836 and 1842, in which years they were submitted to the legislature, and accepted by them as sufficient and satisfactory. In the year 1833 the legislature passed an act authorizing the corporation to change the route of their road in certain places. These are the facts laid before us, upon which we are to determine whether the defendants are now an existing corporation.

The accounts not having been laid before the legislature, the penalty of forfeiture was incurred in terms. But the subsequent accounts were accepted by the legislature as sufficient and satisfactory, and farther powers were conferred upon the defendants by the act of 1833. Has the legislature power to waive the forfeiture? And if it has, do these facts amount to such waiver? These are the questions presented to us by the pleadings.

The doctrine of the waiver of a forfeiture by the legislature by subsequent legislative acts does not apply, if, by the terms of the charter, the franchise absolutely determines on failure to perform the condition; for as in such case the corporation has ceased to exist, the doctrine of waiver is inapplicable. The charter in this case provides that the accounts shall be laid before the legislature, "under forfeiture of the privileges of the act in future." The meaning of this is, that the for feiture shall be proved in the regular, legal manner; upon the institution and prosecution of proceedings in the established course, such neglect of this duty shall be cause of forfeiture. It probably would not be competent for a debtor of the corporation, when sued, to set up by way of defence that the charter of the corporation was forfeited, unless the forfeiture had been established by the judgment of this court. Chester Glass Co. vs. Dewey, 16 Mass. 102; Bank of Niagara vs. Johnson, 8 Wend. 645; The People vs. The Manhattan Co., 9 Wend. 382. That is a matter to be judicially tried and determined, and not to be inquired into collaterally. Where a charter imposes the duty of making stated returns of the expenditures and profits, the government alone can enforce a forfeiture for a neglect of the duty. Peirce vs. Somersworth, 10 N. H. Rep. 369; The State vs. Carr, 5 N. H. Rep. 367. In the case of the Bear Camp River Co. vs. Woodman, 2 Greenl. 404, the charter was to become void, if, at the end of one year, the river should not be cleared of certain obstructions. In an action of assumpsit to recover tolls of the defendant, he offered to prove that the removal of the obstructions had never been effected; but the evidence was rejected at the trial, and the ruling was held to be correct. This case affords a strong illustration of the necessity of specific judicial

proceedings for the purpose of causing the charter to be declared forfeited. And in the case before us, we think that by the omission to lay the accounts before the legislature, the corporation did not, ipso facto, cease to exist, but proceedings must have been instituted, to establish the fact that the penalty of forfeiture was incurred. Rex vs. Pasmore, 3 T. R. 244. A quo warranto is necessary where there is a body corporate de facto, who take upon themselves to act as a body corporate, but, from some defect in their constitution, cannot legally exercise the powers they affect to use. Ashhurst, J. Kent says that he believes there is no instance of calling in question the right of a corporation, as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government. Slee vs. Boom, 5 Johns. Ch. 381. In The People vs. The Manhattan Co., 9 Wend. 382, Mr. Justice Sutherland says, "where the corporation expires by lapse of time, it may be otherwise, and in such case only." A corporation may forfeit its franchises for misfeasance or nonfeasance, but the information for that purpose must be presented under the authority of the State, which must be a party to the suit and a party to the judgment for the seizure of the franchise. The Commonwealth vs. Union Ins. Co., 5 Mass. 230; Rex vs. Amery, 2 T. R. 515; Vernon Society vs. Hills, 6 Cowen, 23.

The corporation, then, being in existence in the year 1830, did the reception of the accounts and the passage of the act of 1833 constitute a waiver of the preëxisting ground of forfeiture, so that it cannot now be insisted on? It is said expressly, by Parsons, C. J., in The Commonwealth vs. Union Ins. Co., 5 Mass. 232, that the commonwealth may waive any breaches of any condition, expressed or implied, on . which the corporation was created. The surrender of a charter can be made only by some solemn, formal act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. Morton, J., Boston Glass Man. vs. Langdon, 24 Pick. If acts of the legislature recognize the subsequent and continued existence of the corporation, such recognition will be a waiver of a for-The People vs. The Manhattan Co. In the case of The People vs. The Kingstown Turnpike Co., 23 Wend. 193, it was held, that an act extending the time for the completion of the road was not a waiver of breaches of conditions; for such was not expressly declared to be the intent of the legislature, nor was the intent necessarily to be implied from the act. From this position Mr. Justice Cowen dissented. and held that a statute expressly giving time to complete the road was equivalent to a renewal or confirmation of the original charter.

In the present case, the legislature did not expressly declare that they recognized the corporation as in existence, or confirmed its privileges, but we think no other construction can be given to their proceedings. It is a reasonable doctrine, that a breach of condition may be waived. It is an important element in the law relating to landlord and

tenant. In Goodright vs. Davids, Cowp. 803, Lord Mansfield observed that forfeitures are not favored in law, and where the forfeiture is once waived the court will not assist it. Coon vs. Brickett, 2 N. H. Rep. 163; Doe vs. Pritchard, 5 B. & Ad. 765. There is as much reason for considering the acts of a legislative body as a waiver of a forfeiture, as there is for giving that effect to the act of a landlord. The State can claim no exemption from the ordinary rules which govern contracts, and there is not to be one law for them and another for private persons. The legislature accepted the accounts laid before them in 1830, and the subsequent years, as sufficient and satisfactory; that is, they were satisfied with the accounts as a sufficient compliance with the charter. The act of 1833 is an equally clear waiver of a forfeiture. Notwithstanding what had occurred, they authorized the corporation to alter the route of their road. The act is susceptible of no other construction in this regard, than that the legislature intended to waive any forfeiture consequent on the prior omissions of the corporation. If they had intended to insist on any forfeiture, the act certainly would not have been made. The act was intended to be beneficial to the corporation. But it would not have been so unless they retained the other corporate powers necessary to enable them to carry into effect the purposes of the act. We are, therefore, of opinion that the rejoinder is a sufficient answer to the replication, and that upon the demurrer there must be Judgment for the defendants.

STATE v. OBERLIN BUILDING AND LOAN ASSOCIATION.

1879. 35 Ohio State, 258.2

QUO WARRANTO. Information filed by the Attorney General, on the relation of Colburn, praying for a judgment of ouster against the defendant corporation. Colburn is a member of the corporation, and was formerly a director. The case was heard on the pleadings, an agreed statement of facts, and certain testimony.

Isaiah Pillars, Attorney General, and N. L. Johnson, for plaintiff I. A. Webster, and Geo. K. Nash, for defendant.

¹ The governor and senate, without the concurrence of the assembly, have no power to waive a forfeiture. Bronson, J., in *People v. Phanix Bank*, A. D. 1840, 24 Wendell, 431, p. 433.

As to whether lapse of time constitutes a bar to a proceeding by the State to enforce a forfeiture, or to test the legality of assumed corporate existence, see 2 Morawetz on Corp., 2d ed. s. 1029, note 2; Taylor on Corp., 3d ed. s. 460; State v. Pawtuxet Turnpike Co., A. D. 1867, 8 Rhode Island, 521; People v. Oakland County Bank, A. D. 1844, 1 Douglas, Mich. 282; Com. v. Bala, &c., Co., A. D. 1893, 153 Pa. State, 47; State v. Janesville Water Power Co., A. D. 1896, 92 Wisc. 496; People v. Reclamation District, A. D. 1898, 121 Calif. 522.—ED.

² Statement abridged. Part of opinion omitted. - ED.

OKEY, J. [After quoting various sections of the act under which the corporation was organized, and stating certain facts as to the conduct of the corporation.]

On this state of facts our conclusions are as follows: -

1. That the association has abused its corporate powers in several particulars, admits of no doubt. It has refused to loan its funds to its members, and it has established such rules and regulations, and so conducted its business by dividing its funds and otherwise, as to prevent the loan of its funds to a member, under the system of competitive bidding contemplated in the statute, and provided for in the by-laws of the company. It has, indeed, loaned its funds, in many instances, to persons who were not members of the association. The illegality of such a course is clearly stated in *State ex rel.* v. Greenville Building and Saving Association, 29 Ohio St. 92.

Again, the association has been in the habit of borrowing money for the purpose of lending it. We do not deny that corporations possess the power to borrow money which may be needed in the transaction of their necessary business; but these transactions fall within no such principle. The money to be loaned by associations like this if, as here, deposits are not received, can only be properly accumulated in the manner contemplated by the statute, that is by dues, fines, premiums, and interest; and the acts complained of, and fully proved by the testimony, cannot be readily distinguished from the business of a banker, They are clearly illegal.

Equally illegal was the act of dividing the money and securities among certain stockholders. It was opposed to the principle upon which such associations are organized. It was, indeed, even if it had been done with perfect impartiality, a plain violation of the statute, which contemplates that no such division shall be made until "said shares are fully paid."

Finally, it was illegal for the association to traffic in shares of its own stock. We do not deny that a corporation has power to receive shares of its stock as security for a debt or other similar purpose; but here the association purchased its own shares of stock, in several instances, for the purpose of disposing of them to persons not intending to become members of the association, with a view of making such shares the basis of loans to such persons. The law will not uphold such transactions.

2. The association compromised with several of its members, and released them from further obligation to the corporation, as well on account of indebtedness for loans, as on subscription. We have examined the evidence, and we do not find there was any want of good faith in these transactions. The interest of the stockholders as well as the public, seems to have been kept in view. Of course, without this such acts could not be upheld; but we are not able to find in the statute any inhibition of the power to make such compromises, and, on the fullest consideration, we unite in holding that the power exists.

3. Where a corporation has been guilty of acts which, by statute, are made a cause of forfeiture of its franchise to be a corporation, this court has no discretion to refuse such judgment. State ex rel. v. Penn. & O. Canal Co., 23 Ohio St. 121. But, in other cases, we are vested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted from the exercise of the powers illegally assumed. With some hesitation, a majority of the court have reached the conclusion that it will be for the interest of the stockholders, as well as the public, that we should render the latter instead of the former judgment. The evidence satisfies us that if the corporation is permitted to wind up its affairs, the work will be accomplished in a few months; but if the association should be ousted from its franchise to be a corporation, we would be required to appoint trustees under the act of 1878 (75 Ohio L. 817, 22; Rev. Stats. 6781), and this would occasion delay and involve increased expense. Accordingly, the corporation will be ousted from the exercise of its powers referred to in the first paragraph of the syllabus, and from the power of permitting any member to hold in his own right more than twenty shares of stock, but not from its franchise to be a corporation, nor from the exercise of the power referred to in the second paragraph of the syllabus.

GILMORE, C. J. I dissent only as to the judgment entered. Such flagrant and persistent violations of corporate powers and duties as are shown in this case, in my opinion, call for and require an application of the severest penalties of the law. The judgment should oust the defendant from being a corporation.

Judgment of ouster as to specified powers.

PEOPLE EX REL. ATTORNEY GENERAL v. KANKAKEE RIVER IMPROVEMENT CO.

1882. 103 Illinois, 491.1

Information in the nature of a quo warranto; alleging that defendant, without any warrant, was exercising the power of controlling the navigation of the Kankakee and Iroquois Rivers, and collecting tolls, and requiring the company to show cause by what warrant it claimed to exercise such powers.

To this information the defendant filed a plea, which was demurred to. The Circuit Court overruled the demurrer, and gave judgment for defendant, dismissing the information. Plaintiff appealed.

The facts set out in the plea were in part as follows: -

In 1847, an act was passed incorporating the Kankakee and Iroquois Navigation Company, with power to improve the navigation of both

- Statement abridged. Arguments and part of opinion omitted. - Ep.

rivers from certain points up to the Indiana State line. No time was prescribed for completing any part of the improvements. Prior to 1865 improvements on a part of the Kankakee river had been made and used. In 1865 an amendatory act was passed, and was accepted by the corporation. Section 6 of this act provides that "said company shall lock and slack-water said Kankakee river from Kankakee City to the east line of the State of Illinois, within eight years from the passage of this act, . . ." The plea admits that the improvement from Kankakee City to the east line of the State of Illinois has not been commenced, and is no longer in contemplation by the defendant. The defendant corporation was formed about 1879 by persons who had purchased at a mortgage foreclosure sale the franchise, improvement, and real estate of the original corporation.

James Mc Cartney, Attorney General, for the people.

G. D. A. Parks, for appellee.

SHELDON, J.

We can see here but one entire franchise for the improvement of these streams, and that this obligation to make the improvement above Kankakee City was a condition annexed to this entire franchise. And we can not admit the idea, so ably and ingeniously pressed upon us, of the divisibility of the franchise, that there became a separate, independent franchise as to the completed portion of the improvement below Wilmington, and a like one as to the portion of the improvement above Kankakee City, to which latter only the condition was annexed, and that it was the franchise as to this last named portion of the improvement only which was forfeitable for breach of the condition. We think the non-compliance with the requirement in question was cause of forfeiture of the entire franchise. An abuse in a particular department of an entire franchise is cause of forfeiture of the whole franchise. Angell & Ames on Corp. sec. 776.

The hardship upon the company of enforcing a forfeiture is urged as a reason against applying this remedy. This is the common argument addressed to courts in these cases, and the answer they make is, that the appeal is made to the wrong forum, — that this is a question for the legislature that prescribed the requirements of the charter. The courts have no dispensing power; that the only questions for a court in such cases are, is the act required, and has it been performed. Yielding to such considerations of hardships would be a doing away with the established legal remedy of forfeiture for the breach of conditions annexed to estates. Inconvenience is the necessary result of the application of such a remedy. It is held to be most important to the public interest that the grantees of public franchises should be held to a faithful performance of the obligations which they assume, and to secure this, courts must administer the prescribed remedy in case of failure.

Lastly, the court is invoked to exercise its discretionary power under the statute, and only assess a fine, the statute providing that instead of judgment of ouster from a franchise for an abuse thereof, unless the court is of the opinion that the public good demands such judgment, a fine may be assessed instead. Had there been but the omission of some duty of minor importance, the alternative of a fine might properly be considered; but the non-performance here is of a thing which is of the essence of the contract,—it goes to the object of the incorporation, not doing the very thing the performance of which was the purpose and object for which the company was instituted. It is failure by the corporation to act up to the end of its creation. The demand of public good is nothing less than that there should be a resumption by the State of the corporate franchise of which there has been such misuser,—that the company should be made to give way, so as to afford opportunity, through some other instrumentality, for the accomplishment of this work of public advantage, the improvement of the navigation of these two rivers, or at least of the Kankakee, to the Indiana State line.

Being of opinion the demurrer to the plea should have been sustained, the judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

WHEELER v. PULLMAN IRON & STEEL CO.

1892. 143 Illinois, 197.1

BILL IN EQUITY by two stockholders in the Pullman Iron & Steel Co. against said company and certain other defendants; praying (inter alia) that the corporation be dissolved and its business closed up; that a receiver be appointed; and that an accounting be had between the parties growing out of matters stated in the bill. A demurrer to the bill was sustained and the bill dismissed. On appeal to the Appellate Court this decree was affirmed. Plaintiffs now prosecute this further appeal.

Ullman & Hacker, for appellants.

John S. Runnells, and William Burry, for appellees.

SHOPE, J. Without pausing to consider the ground of objection that the bill is multifarious, we are of opinion that the demurrer thereto was, on other grounds, properly sustained, and complainants electing to stand by their bill, it was properly dismissed.

It is insisted that the bill may be maintained upon either of two grounds: First, as a bill to dissolve the corporation, wind up its affairs, and distribute its assets; and second, as a bill for an accounting between this corporation and the Pullman Palace Car Company and other creditors.

In the absence of statutory authority, courts of chancery had no jurisdiction to decree a dissolution of a corporation by declaring a for

¹ Statement abridged. Arguments and part of opinion omitted. - Ep.

feature of its franchise, either at the suit of an individual or of the State. Verplanck v. Merchants' Ins. Co. 1 Edw. Ch. 84; Doyle v. Peerless Petroleum Co. 44 Barb. 239; Folger v. Columbian Ins. Co. 99 Mass. 274; Attorney General v. Bank of Niagara, 1 Hopk. 354; Denike v. New York, etc. 80 N. Y. 605. The mode of enforcing a forfeiture of the charter at common law was by scire facias or quo warranto in courts of law only, and at the suit, only, of the sovereign. The judgment in such cases, at law, relates solely to the right to exercise the corporate franchise, and operates to extinguish corporate existence. In respect of trade corporations, independently of statutory provision, and notwithstanding the dissolution of the corporation, its assets belong to those who contributed to its capital and for whom it stood as representative in the business in which it was engaged, and are treated in equity as a trust fund, to be administered for the benefit of the bona fide holders of stock, subject to the just claims of creditors of the corporation. Morawetz on Corporations, 1032, and cases cited.

The necessity for invoking the aid of a court of equity after judgment of forfeiture at law, that court alone being competent to reach and administer the fund, has led to statutory enactments vesting courts of equity with jurisdiction to decree a dissolution of the corporation and to wind up its affairs, in given cases, at the suit of an individual beneficiary of the fund. The power to confer such jurisdiction by statute, as one of the powers over corporations reserved by the State, has been uniformly recognized, and nowhere more clearly than in this State, (Ward v. Farwell et al. 97 Ill. 593; Chicago Mutual Life Indemnity Ass. v. Hunt, 127 id. 257,) and whenever the power of the court of chancery has been properly invoked the jurisdiction has been sustained. Life Ass. of America v. Fassett, 102 Ill. 315; Chicago Life Ins. Co. v. The Auditor, 101 id. 82; Mining Co. v. Mining Co. 116 id. 170, and cases supra.

By the 25th section of the statute for the incorporation of companies for pecuniary profit, being the only section applicable here, it is provided: "If any corporation, or its authorized agents, shall do or refrain from doing any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for the payment of money, after demand made by the officer, to be returned, 'no property found,' or to remain unsatisfied not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or in any way liable for the debts of the corporation, by joining the corporation in such suits," etc. And after providing for pro rata liability of stockholders upon unpaid subscriptions, etc., and for enforcing the same, proceeds: "And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor," with authority to wind up its affairs.

It is not pretended that the facts alleged bring the bill within the

provisions of the clause of the statute first quoted. It is not alleged, nor are facts set forth showing, that any of the causes exist for which bills in equity are by this statute authorized to be filed. The bill invokes, not the power conferred by the statute, but the general chancery powers of the court. But it is said, in effect, that as the second clause of the statute quoted gives courts of equity power to decree the dissolution of a corporation "on good cause shown," it may exercise that jurisdiction whenever the interests of the stockholders, or any of them, in equity and good conscience demand it. We do not think the statute capable of that construction. It is clear that the purpose of the provision was to enable the court, in all cases in which the jurisdiction of the court was properly invoked under the statute, to afford complete relief. By the first clause a remedy is provided by which the assets of the corporation, in the cases enumerated in the statute, may be applied in payment of its liabilities, and if insufficient therefor, that subscribers for and holders of unpaid stock of the corporation may be compelled to contribute to the payment of any balance of corporate indebtedness after the application of the corporate effects, without first procuring a judgment of forfeiture at law. No judgment forfeiting the charter of the corporation is necessary to authorize the court to afford this relief, but by the later provision the court may, in cases where cause of forfeiture exists, declare the same, and by its decree dissolve the corporation, and through its receiver administer and distribute the corporate estate, thus making the remedy in equity, in such cases, complete. (St. Louis, etc. Mining Co. v. Mining Co. 116 Ill. 170; Alling v. Wenzel, 133 id. 264.) As said by this court, in construing this provision of the statute, in Chicago Mutual Life Ins. Co. v. Hunt, 127 Ill. 274: "Courts of equity are given full power, on good cause shown, as a portion of the relief provided for by that section, to dissolve or close up the business of the corporation and to appoint a receiver of its effects." We are of opinion that it is only "as a portion of the relief provided for by that section" that the power to dissolve the corporation can be invoked. Moreover, "good cause" for dissolving the corporation would necessarily be a legal cause, - a cause for which the sovereign authority might by law, resume the franchise granted. can not be presumed that the legislature intended, by the use of the language here employed, to authorize a decree forfeiting the corporate franchise for causes for which the State might not procure judgment of forfeiture at law. The bill is not maintainable upon this ground.

[Remainder of opinion omitted.]

Judgment affirmed.

ATTORNEY GENERAL v. TUDOR ICE CO.

1870. 104 Mass. 239.

Information in equity by the attorney general, on behalf of the Commonwealth, and at the relation of Richard Price, to restrain the defendants from engaging in or carrying on any business other than the cutting, storing and selling of ice. Hearing, on a motion for an injunction, before the chief justice, who reported the case as follows:

"The company was organized in 1861, under the Gen. Sts. c. 61, for the purpose of cutting, storing and selling ice. Its capital stock was fixed at \$360,000. It has carried on this business ever since, but has also carried on various other branches of business; has been in the habit of chartering vessels for the East Indies, loading them with ice so far as was proper, and completing the cargo by purchasing and exporting kerosene oil, tobacco, rosin and lumber; and has also imported merchandise of various kinds, including paddy, jute, linseed and tea. It has also erected buildings, and placed machinery in them, which cost about \$400,000. Some of the machinery is for the manufacture of tobacco, but the manufacture was discontinued about two years ago. Some of it is for cleaning rice, some for the manufacture of jute into gunny cloth, and some for the manufacture of linseed into oil. These branches of business it still carries on, and the capital invested in them is three or four times larger than its capital stock. The business is connected with the exportation of ice, and has increased the profits of the company, but does not appear to be necessary to its legitimate business. It has imported two cargoes of tea, worth \$300,000, which had no connection with the ice trade. It does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason. I report the case for determination upon the questions, whether this information in equity can be maintained, and, if it can be maintained, whether a temporary injunction ought to be issued, upon the facts above stated."

S. Bartlett, for the Attorney General.

C. B. Goodrich & H. W. Paine, for the defendants.

GRAY, J. This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the Commonwealth.

The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a suit by a stockholder or a creditor. The acts complained of are not shown to have injured or endangered any rights of the public, or of any individual

or other corporation; and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the chief justice, that "it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason." No case is therefore made, upon which, according to the principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery.

In Attorney General v. Utica Insurance Co. 2 Johns. Ch. 371, Chancellor Kent, in a very able and elaborate judgment, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York; but that the proper remedy was at law, by information in the nature of a quo warranto; and no appeal appears to have been taken from his decree. An information in the nature of a quo warranto was thereupon filed, and sustained by the supreme court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. People v. Utica Insurance Co. 15 Johns. 358. Similar proceedings may be had at law in this Commonwealth in a proper case. Goddard v. Smithett, 3 Gray, 116, 122, 123. Attorney General v. Salem, 103 Mass. 138. Boston & Providence Railroad Co. v. Midland Railroad Co., 1 Gray, 340. Gen. Sts. c. 145, §§ 16-24.

One early English case of high authority, not cited by Chancellor Kent, nor at the argument of the present case, is so much in point as to be worth quoting in full. Upon a bill in equity, filed by the attorney general, at the relation of several freemen of the Weavers' Company, against the officers of that company, setting forth "that the defendants had been guilty of many breaches and violations of their charters, and had oppressed the freemen, &c., and mentioned some particulars; and for a discovery of the rest, and that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation which the defendants had misspent, &c., was the end of the bill. To which the defendants demurred, because, as to part of the bill, it was to subject them to prosecutions at law, and to a quo warranto; and as to the other parts, the plaintiffs had remedy by mandamus, information, or otherwise, and not here. And of the same opinion," the report proceeds, was Lord Cowper, "who said it would usurp too much on the king's bench; and that he never heard of any precedent for such a case as this; and so allowed the demurrer." Attorney General v. Reynolds, 1 Eq. Cas. Ab. (3d ed.) 131.

The modern English cases, cited in support of this information, were of suits against public bodies or officers exceeding the powers conferred upon them by law, or against corporations vested with the

power of eminent domain and doing acts which were deemed inconsistent with rights of the public.

Some of them were cases of misapplication of funds raised by taxation and held by municipal corporations or officers upon specific public trusts. Such were Attorney General v. Norwich, 16 Sim. 225, Attorney General v. Guardians of Poor of Southampton, 17 Sim. 6, and Attorney General v. Andrews, 2 Macn. & Gord. 225.

The hypothetical case, in which Lord Westbury, in Stockport District Waterworks v. Manchester, 9 Jur. (N. S.) 266, said that he should "probably not hesitate" to act upon the information of the attorney general, was of a suit to restrain the making of a contract between an aqueduct corporation and a city to carry water beyond the limits which the city was authorized by law to supply.

The passages cited from Liverpool v. Chorley Water Works Co. 2 De Gex, Macn. & Gord. 852, 860, and Ware v. Regent's Canal Co. 3 De Gex & Jones, 212, 228, were but dicta that an unauthorized diversion of water or flowing of land by an aqueduct or canal corporation, without proof of actual or imminent injury to property, gave no right of suit to an individual, and could only be checked on an application to the court by the attorney general.

The case of Attorney General v. Great Northern Railway Co. 4 De Gex & Smale, 75, was a clear case of nuisance, the unlawful obstruction of a public highway by a railroad. That of Attorney General v. Oxford, Worcester & Wolverhampton Railway Co. 2 Weekly Rep. 330, was the case of the opening of a railway line in violation of an order which an authorized public board had made upon the ground that it would be unsafe to the public.

The single case, in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers, is Attorney General v. Great Northern Railway Co. 1 Drewry & Smale, 154, in which Vice Chancellor Kindersley in 1860 restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the dictum of Vice Chancellor Wood, two years later, in Hare v. London & Northwestern Railway Co. 2 Johns. & Hem. 80, 111.

In Attorney General v. Mid Kent Railway Co. Law Rep. 3 Ch. 100, a mandatory injunction was granted upon the information of the attorney general to compel a railway company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter; and the objection that the attorney general might have had an equal and complete remedy at law was stated by each of the lords justices as if it required no answer and afforded no ground for refusing to entertain jurisdiction in equity. It is often said, in the English books, that the king or his attorney general, suing in behalf of

the public, has the election to sue in either of his courts, and may therefore enforce a legal right in the court of chancery. 1 Dan. Ch. Pract. (3d Am. ed.) 6, 7. Attorney General v. Galway, 1 Molloy, 95, 103. However that may be, by our statutes the general equity jurisdiction of this court is limited to cases where there is no plain, adequate and complete remedy at law, as well in suits by the Commonwealth as in those brought by private persons. Gen. Sts. c. 113, § 2. Commonwealth v. Smith, 10 Allen, 448. Clouston v. Shearer, 99 Mass. 209, 211, and other cases there cited. The 38th of the former rules in chancery of this court (14 Gray, 360) by which the court adopted, as the outlines of its practice, the practice of the high court of chancery in England, so far as the same was not repugnant to the Constitution and laws of the Commonwealth, nor to those or such other rules as the court might from time to time make, cannot enlarge the jurisdiction of this court as defined by statute, and has been repealed by the new rules recently established. Rules of 1870, post, 555.

The only cases in which informations in equity in the name of the attorney general have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters. District Attorney v. Lynn & Boston Railroad Co. 16 Gray, 242. Attorney General v. Cambridge, Ib. 247. Attorney General v. Boston Wharf Co. 12 Gray, 553. Rowe v. Granite Bridge Co. 21 Pick. 344, 347. The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. County Attorney v. May, 5 Cush. 336. Jackson v. Phillips, 14 Allen, 539, 579. Attorney General v. Garrison, 101 Mass. 223. Gen. Sts. c. 14, § 20. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them. Information dismissed.

¹ But see Ryan, C. J., in Attorney General v. R. R. Companies, A. d. 1874, 35 Wisconsin, 425, pp. 523-550; and McGill, Chancellor, in Stockton, Attorney General, v. Central R. R. Co. of New Jersey, A. d. 1892, 50 New Jersey Equity, 52, pp. 78-85. In the first case there was a petition for an injunction to restrain the railroad companies from charging tolls in excess of the maximum rates established by statute. In the second case the ultimate object was to obtain a decree, declaring void a lease which was ultra vires and positively forbidden by law, and the practical effect of which was to partially destroy competition in the production and sale of coal. The purpose of the immediate application was to secure a temporary injunction. In both cases it was held, that the attorney general could maintain a proceeding in equity.—Ed.

PEOPLE v. NEW YORK CENTRAL, &c. R. R. Co.

1883. 35 New York Supreme Court (28 Hun), 543.1

APPEALS from orders of the Special Term, granting motions to quash and dismiss the petitions and orders to show cause of the appellants, and denying the application of the appellants for peremptory writs of mandamus.

Upon the facts set forth in the petition and accompanying affidavits, an order was made in each of the above entitled proceedings requiring the respondent to show cause "why a peremptory writ of mandamus to compel the said corporation to exercise its franchises, and to receive and transport freight upon such terms as are reasonable and usual, and to perform its duties as a common carrier" should not issue in each case.

Leslie W. Russell, attorney-general, and E. C. James, Simon Sterne, and Daniel G. Thompson, for the appellants.

W. D. Shipman and Roscoe Conkling, for the respondents.

Davis, P. J. . . . The question presented by the motion is one of signal importance. It is whether the people of the State can invoke the power of the courts to compel the exercise by railroad corporations of the most useful public functions with which they are clothed. If the people have that right, there can be no doubt that their attorney-general is the proper officer to set it in effective operation on their behalf (1 R. S. 179, § 1; Code of Civ. Proc. § 1993; People v. Halsey, 37 N. Y. 344; People v. Collins, 19 Wend. 56).

The question involves a consideration of the nature of this class of corporations, the objects for which they are created, the powers conferred and the duties imposed upon them by the laws of their creation, and of the State. As bodies corporate, their ownership may be and usually is altogether private, belonging wholly to the holders of their capital stock; and their management may be vested in such officers or agents as the stockholders and directors under the provisions of law may appoint. In this sense they are to be regarded as trading or private corporations, having in view the profit or advantages of the corporators. But these conditions are in no just sense in conflict with their obligations and duties to the public. The objects of their creation are, from their very nature, largely different from those of ordinary private and trading corporations. Railroads are, in every essential quality, public highways, created for public use, but permitted to be owned, controlled, and managed by private persons. But for this quality the railroads of the respondents could not lawfully exist. Their construction depended upon the exercise of the right of eminent domain, which belongs to the State in its corporate capacity alone, and cannot be conferred, except upon a "public use." The

1 Portions of opinion omitted. - ED.

State has no power to grant the right of eminent domain to any cor. poration or person for other than a public use. Every attempt to go beyond that is void by the Constitution; and although the legislature may determine what is a necessary public use, it cannot by any sort of enactment divest of that character any portion of the right of eminent domain which it may confer. This characteristic of public use is in no sense lost or diminished by the fact that the use of the railroad by the corporation which constructs or owns it, must, from its nature be exclusive. That incident grows out of the method of use which does not admit of any enjoyment in common by the public. The general and popular use of a railroad as a highway is therefore handed over exclusively to corporate management and control because that is for the best and manifest advantage of the public. The progress of science and skill has shown that highways may be created for public use, of such form and kind that the best and most advantageous enjoyment by the people can only be secured through the ownership, management, and control of corporate bodies created for that purpose. and the people of the State are not restricted for availing themselves of the best modes for the carriage of their persons and property. There is nothing in the Constitution hostile to the adoption and use by the State of any and every newly developed form or kind of travel and traffic, which have a public use for their end and aim, and giving to them vital activity by the use of the power of eminent domain.

When the earliest Constitution of our State was adopted, railroads were unknown. The public highways of the State were its turnpikes, ordinary roads, and navigable waters. The exercise of eminent domain in respect of them was permitted by the Constitution for the same reasons that adapt it now to the greatly improved methods of travel and transportation; and in making this adaptation, there is no enlarged sense given to the language of the Constitution, so long as its inherent purpose — the creation only of public uses — be faithfully observed.

These principles are abundantly sustained by authority. In Bloodgood v. The Mohawk and Hudson River Railroad Company (18 Wend. 9), the court of last resort in this State first announced them, and affixed to railroads their true character as public highways. It is there declared that the fact that railroad corporations may remunerate themselves by tolls and fares, "does not destroy the public nature of the road, or convert it from a public to a private use. . . . If it is a public franchise and granted to the company for the purpose of providing a mode of public conveyance, the company, in accepting it, engages, on its part, to use it in such manner as will accomplish the object for which the legislature designed it." (Pages 21, 22.) And in Olcott v. The Supervisors (16 Wall. 678, on p. 694), the Supreme Court of the United States adjudged: "that railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such

conveniences for passage and transportation have had any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted, that a State legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself, or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant. . . . Whether the use of a railroad is a public or a private one, depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public. . . . The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

All public highways are subjects of general State jurisdiction, because the uses are the common property of the public. This principle of the common law is in this State of universal application. As to the class of public highways known as railroads, the common law is fortified by the express conditions of the statutes creating or regulating or controlling them.

The general railroad act of this State may now be regarded as the general charter of all such corporations. It authorizes the organization of corporations for "the constructing, maintaining and operating" of railroads "for public use," and it imposes upon them the duty "to furnish accommodations for all passengers and property, and to transport all persons and property on payment of fare or freight." (Laws of 1850, chap. 140, §§ 1, 36.) These words are a brief summary in respect of the duties imposed upon such corporations by all the provisions of the act. Those duties are consigned to them as public trusts, and as was said in Messenger v. The Pennsylvania Railroad Company (36 N. J. 407), "although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the general good." This relation of such a corporation to the State is forcibly

expressed by Emmons, J., in Talcott v. Township of Pine Grove (1 Flippin U. S. Circuit Ct. Rep. 144): "The road once constructed is, instanter, and by mere force of the grant and law, embodied in the governmental agencies of the State and dedicated to public use. All and singular its cars, engines, rights of way and property of every description, real, personal and mixed, are but a trust fund for the political power, like the functions of a public office. The judicial personage—the corporation created by the sovereign power expressly for this sole purpose and no other—is, in the most strict technical and unqualified sense, but its trustee. This is the primary and sole legal political motive for its creation. The incidental interest and profits of individuals are accidents, both in theory and practice."

The acceptance of such trusts on the part of a corporation, by the express and implied contracts already referred to, makes it an agency of the State to perform public functions which might otherwise be devolved upon public officers. The maintenance and control of most other classes of public highways are so devolved, and the performance of every official duty in respect of them may be compelled by the courts, on application of the State, while private damages may also be recoverable for individual injuries. The analogy between such officials and railroad corporations in regard to their relations to the State, is strong and clear, and so far as affects the construction and proper and efficient maintenance of their railways will be questioned by no one. It is equally clear, we think, in regard to their duty as carriers of persons and property. This springs sharply out of the exclusive nature of their right to do those things. On other public highways every person may be his own carrier; or he may hire whomsoever he will to do that service. Between him and such employe a special and personal relation exists, independent of any public duty, and in which the State has no interest. In such a case, the carrier has not contracted with the State to assume the duty as a public trust, nor taken the right and power to do it from the State by becoming the special donee and depositary of a trust. A good reason may, therefore, be assigned why the State will not by mandamus enforce the performance of his contract by such a carrier. But the reason for such a rule altogether fails when the public highway is the exclusive property of a body corporate, which alone has power to use it, in a manner which of necessity requires that all management, control and user for the purposes of carriage must be limited to itself, and which. as a condition of the franchise that grants such absolute and exclusive power over and user of a public highway, has contracted with the State to accept the duty of carrying all persons and property within the scope of its charter, as a public trust. The relation of the State to such a body is entirely different from that which it bears to the individual users of a common highway, as between whom and the State no relation of trust exists; and there is small reason for seeking analogies between them. It is the duty of the State to make and maintain public highways. That duty it performs by a scheme of laws, which set in operation the functions of its political divisions into counties, towns and other municipalities, and their officers. It can and does enforce those duties whenever necessary through its courts. It is not the duty of the State to be or become a common carrier upon its public highways; but it may, in some cases, assume that duty, and whenever it lawfully does so, the execution of the duty may be enforced against the agents or officers upon whom the law devolves it. It may grant its power to construct a public highway to a corporation or an individual and with that power its right of eminent domain in order to secure the public use; and may make the traffic of the highway common to all on such terms as it may impose. In such case it is its duty to secure that common traffic, when refused, by the authority of its courts. (People v. Collins, 19 Wend. 56; People v. Commissioners of Salem, 1 Cow. 23.) Or it may grant the same powers of construction and maintenance with the exclusive enjoyment of use which the manner of use requires, and if that excludes all common travel and transportation it may impose on the corporation or person, the duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as public needs may require. Why is that duty, in respect of the power to compel its performance through the courts, not in the category of all others intrusted to such a body? The writ of mandamus has been awarded to compel a company to operate its road as one continuous line (Union Pacific R. R. Co. v. Hall, 91 U. S. 343); to compel the running of passenger trains to the terminus of the road (State v. H. and N. H. Ry. Co., 29 Conn. 538); to compel the company to make fences and cattle guards (People ex rel. Garbutt v. Rochester State Line R. R. Co., 14 Hun, 373; s. c. 76 N. Y. 294); to compel it to build a bridge (People ex rel. Kimball v. B. & A. R. R. Co., 70 N. Y. 569); to compel it to construct its road across streams. so as not to interfere with navigation (State v. N. E. R. R. Co., 9 Richardson, 247); to compel it to run daily trains (In re New Brunswick, etc., R. R., 1 P. & B. 667); to compel the delivery of grain at a particular elevator (Chicago and Northwestern R. R. Co. v. People, 56 Ill. 365); to compel the completion of its road (Farmers' Loan and Trust Co. v. Henning, 17 Am. Law Reg. [N. s.] 266); to compel the grading of its track so as to make crossings convenient and useful (People ex rel. Green v. D. and C. R. Co., 58 N. Y. 152; N. Y. C. and H. R. R. R. Co. v. People, 12 Hun, 195; s. c. 74 N. Y. 302; Indianapolis R. R. Co. v. The State, 37 Ind. 489); to compel the reëstablishment of an abandoned station (State v. R. R., 37 Conn. 154); to compel the replacement of a track taken up in violation of its charter (Rex v. Severn and Wye Ry. Co., 2 Barn. & Ald. 646); to prevent the abandonment of a road once completed (Talcott v. Pine Grove, supra, 1 Flippin, 145); and to compel a company to exercise its franchise. (People v. A. and V. R. R. Co., 24 N. Y. 261.) These are all express

or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is, indeed, the *ultima ratio* of their existence; the great and sole public good for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert that the State, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but is then powerless to compel the doing of the thing itself.

We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by mandamus to exercise its duties as a carrier of freight and passengers; and that the power so to compel it rests equally firmly on the ground that that duty is a public trust, which having been conferred by the State and accepted by the corporation may be enforced for the public benefit; and also upon the contract between the corporation and the State, expressed in its charter or implied by the acceptance of the franchise (Abbott v. Johnstown R. R. Co., 80 N. Y. 31); and also upon the ground that the common right of all the people to travel and carry upon every public highway of the State has been changed in the special instance, by the legislature for adequate reasons into a corporate franchise, to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, whereby it has become the duty of the State to see to it that the franchise so put in trust be faithfully administered by the trustee.

But it is said that the State is not injured and has no interest in the question whether the corporation perform the duty or not. The State may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust for the people the official duties reposed in their hands; but that is no test of the power or duty of the State in either case. The sovereignty of the State is injured whenever any public function vested by it in any person, natural or artificial, for the common good is not used or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the State and thereby, in a legal sense, injures the entire body politic. The State, in such a case as this, has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations had neglected public duties. (People v. Fishkill & B. P. R. Co., 27 Barb. 452, 458; People v. H. and C. Turnpike Co., 23 Wend. 254; Turnpike Co. v. State, 3 Wall. 210; People v. K. & M. Turnpike Co., 23 Wend. 208; People v. B. & R. Turnpike Co., Id. 222; Charles River Bridge Co. v. Warren Bridge, 7 Pick. 344.) But that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It has, therefore,

an election which of these remedies to pursue. (State v. H. & N. H. Railroad Co., 29 Conn. 538; People v. A. & V. Railroad Co., 24 N. Y. 261; Talcott v. Pine Grove, supra.)

Undoubtedly a sound discretion is vested in its law officer to decide whether the exigency is such as to call for the use of either remedy, as it is ultimately for the court to judge whether the elected remedy should be applied. But upon the question of power and of sufficient legal injury to justify its use, where the corporation neglects or refuses to exercise its franchise or perform its duties, there seems to us no reason to doubt.

Nor do we think the fact that injured individuals may have private remedies for the damages they have sustained by neglect of duties, precludes the State from its remedy by mandamus. Where the injury is to a single person under circumstances which do not affect the general public the courts, in the exercise of their discretion, have properly refused this remedy on his relation. The injured party is then the suitor; he has an adequate remedy by private action for damages. That was the case of People ex rel. Ohlen v. Erie Railway Company (22 Hun, 533), relied upon by the court below, in which the court held that the relator's remedy was by suit for damages and not by mandamus. That case is not authority for denying the writ to the Attorney-General for a neglect or refusal by corporations to exercise their franchises to an extent which affects a great number of citizens, and continues for a considerable period of time; nor does it deny the right of the people acting on their own behalf and in their own suit to pursue this remedy in any case of neglect or refusal to exercise a public function which the interest of the people require should be kept in vigorous and efficient use.

The court, in that case, recognizes the distinction, when it says, "an exception exists," . . . "where a corporation suspends the exercise of its franchises." The suspension of the exercise of corporate functions is the gravamen of the complaint in this case; and the case cited is no authority for denying the writ when the people come into court with their own suit, by their attorney-general to move for a writ of mandamus on allegations of an alleged long continued and very general suspension of a corporate duty.

It was supposed by the court below that the provisions of section 28 of the act of 1850 (chap. 140) as amended by chapter 133 of the Laws of 1880, which provide that railroad corporations shall have power "to regulate the time and manner in which passengers and property shall be transported," interfere in some way with the power to grant the writ. Undoubtedly that provision gives the discretion which the learned judge states; but it cannot be so construed as to justify a general or partial suspension of the duty of receiving and transporting freight. Language of that kind in a similar act was correctly construed by Dickerson, J., in the Railroad Commissioners v. Portland and Oxford Railroad Company (63 Me. 269). We adopt, but have not moom to quote his language.

Having determined the question of the right of the State to prosecute the writ of mandamus on the ground of refusal or neglect of a corporation to exercise its duty of carrier, it remains to be seen whether a case which would justify the granting of the writ was presented. The case stands altogether upon the facts presented by the appellants. The course taken by the respondents must be regarded as an admission of the material facts contained in the petition and affidavits.

[The affidavits show that, for about two weeks, the railroad company failed and neglected to receive from three-quarters to seveneighths of the goods offered for transportation from the city, and large quantities seeking transportation to the city; and in many instances refused to receive goods offered.

The excuse offered by the railroad company was, in substance, as follows:

The skilled freight-handlers of the company refused to work without an increase of wages to the amount of three cents per hour. The company refused to pay such increase. The skilled laborers then abandoned the work. Their abandonment of the work, and the inefficiency of the unskilled men afterwards employed, caused the neglect and refusal complained of; the company not procuring other laborers competent or sufficient in number to do the work. It was not alleged or shown that the former workmen committed any unlawful act; and no violence, no riot, and no unlawful interference with other employees of the respondent appeared.

The foregoing facts do not constitute a valid excuse for the railroad company's failure to perform their public duties.

If it had been shown that a "strike" of their skilled laborers had been caused or compelled by some illegal combination or organized body, which held an unlawful control of their actions, and sought through them to enforce its will upon the railroad company, and that the company, in resisting such unlawful efforts, had refused to obey unjust and illegal dictation, and had used all the means in their power to employ other men in sufficient numbers to do the work, and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the attorney general, would have been presented.] 1

We think the court below had power to award the writ, and that upon the case presented it was error to refuse it.

Order reversed.

Daniels and Brady, JJ., concurred.2

¹ The passages enclosed in [] are an abridgment of the opinion of the court on this branch of the case. — ED.

^{2 &}quot;There are many cases, however, where the performance of a public duty by a corporation cannot be compelled by writ of mandamus, though the duty itself be clear. The propriety of issuing the writ of mandamus depends in part upon the character of the acts to

UNION PACIFIC R. CO. v. HALL.

1875. 91 United States, 343.1

ERROR to the Circuit Court of the United States for the District of Iowa.

A. J. Poppleton, for plaintiff in error.

John N. Rogers, contra.

Strong, J. This is a proceeding instituted under the act of Congress of March 3, 1873 (17 Stat. 509, sect. 4), which confers upon the proper Circuit Court of the United States jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. The alternative writ, as amended, commanded the railroad company to operate the whole of their road from Council Bluffs westward (including that portion thereof between Council Bluffs and Omaha, and constructed over and across their bridge spanning the Missouri River) as one continuous line for all purposes of communication, travel, and transportation; and especially commanded them to start from Council Bluffs their regular through freight and passenger trains westward bound, and to run their eastern-bound trains of both descriptions through and over said bridge to Council Bluffs under one uniform time-schedule with the remainder of their road, and to desist and refrain wholly from operating said last-mentioned portion of said road as an independent and separate line, and from causing freight or passengers bound westward or eastward to be transferred at Omaha, or to show cause why they did not obey the writ.

To the alternative mandamus the railroad company put in a return, which was met by an answer filed by the relators; and the case was heard by the Circuit Court on the facts stated in the writ, the return, and the answer (the averments of the answer not being controverted), and a peremptory mandamus was ordered. It is of this final judgment that the plaintiffs in error now complain.

The obligation of the Union Pacific Railroad Company to operate

be enforced. A court should never attempt to compel the specific performance of an obligation, where it is apparent that the attempt would prove unavailing; and hence the writ of mandamus should not, as a rule, be issued in order to enforce the performance of a duty involving the exercise of a large measure of good faith and discretion on the part of the

bligor.

"It may be doubted, therefore, whether it be a rule applicable in all cases, that the courts will compel a railroad company to operate its line of road, even though the duty of the company be clear. The difficulty of supervising unwilling agents in the performance of a continuing duty of so complicated a nature as that of properly managing a railroad, involving the exercise of a large amount of discretion and technical skill, would in many cases prove a serious obstacle in the way of such an attempt. Whether a writ of mandamus shall be issued, is in every case a matter resting largely in the discretion of the court, and depends upon all the surrounding facts and circumstances." 2 Morawetz on Corporations, 2d ed. s. 1134. — Ed.

1 Part of opinion omitted. - ED.

their road as a continuous line, throughout its entire length, is not denied. The company is a creature of congressional legislation. It was incorporated by the act of Congress of July 1, 1862 (12 Stat. 489); and its powers and duties were prescribed by that act, and others amendatory thereof. By the twelfth section it was enacted that the "whole line of the railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line." A similar requisition was made in the fifteenth section of the amendatory act of July 2, 1864. 13 Stat. 356. The contest in the case does not relate to the existence of this duty: it is principally over the question, whether the railroad bridge over the Missouri River, between Omaha in Nebraska and Council Bluffs in Iowa, is a part of the Union Pacific Railroad; for, if it is, there can be no doubt that the company are required by law to use it in connection with, and as a part of, their entire road, operating all parts together as a continuous line.

The answer to this question must be found in the legislation of Congress, and in what has been done under it.

[After a discussion of this question.]

Holding then, as we do, that the legal terminus of the railroad is fixed by law on the Iowa shore of the river, and that the bridge is a part of the railroad, there can be no doubt that the company is under obligation to operate and run the whole road, including the bridge, as one connected and continuous line. This is a duty expressly imposed by the acts of 1862 and 1864, and recognized by that of 1871. What this means it is not difficult to understand. It is a requisition made for the convenience of the public. An arrangement, such as the company has made, by which freight and passengers destined for or beyond the eastern terminus are stopped two or three miles from it and transferred to another train, and again transferred at the terminus, or by which freight and passengers going west from the eastern end of the line must be transferred at Omaha, breaks the road into two lines, and plainly is inconsistent with continuous operation of it as a whole. If not, the injunction of the statute has no meaning. The mandamus awarded in this case, therefore, imposes no duty beyond what the law requires.

Such is our opinion of the merits of this case. A single objection made and urged against the form of proceeding remains to be considered. The appellants contend that the court erred in holding that Hall and Morse, on whose petition the alternative writ was issued, could lawfully become relators in this suit on behalf of the public without the assent or direction of the Attorney-General of the United States, or of the district attorney for the district of Iowa. They were merchants in Iowa, having frequent occasion to receive and ship goods over the company's road; but they had no interest other than such as belonged to others engaged in employments like theirs, and

the duty they seek to enforce by the writ is a duty to the public generally. The question raised by the objection, therefore, is, whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator. Clearly in England it may. Tapping on Mandamus, p. 28, asserts the rule in that country to be, that, "in general, all those who are legally capable of bringing an action are also equally capable of applying to the Court of King's Bench for the writ of mandamus." This is true in all cases, it is believed, where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest; and it is equally true, we think, in case of applications to compel the performance of duties to the public by corporations. In The King v. The Severn & Wye Railway Co., 2 Barn. & Ad. 646, a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a mandamus should not issue commanding them to lay down again and maintain part of a railway which they had taken up. Under an act of Parliament, the railway was a public highway; and all persons were at liberty to pass and repass thereon, with wagons and other carriages, upon payment of the rates. What the prosecutor complained of was the loss by the public, and particularly by the owners of certain collieries (of which he does not appear to have been one), of the benefit of using the railway taken up. The writ was awarded. It was not even claimed that the intervention of the Attorney-General was needed. Other cases to the same effect are numerous. Clarke v. The Leicestershire & Northamptonshire Union Canal Co., 6 Ad. & El. N. s. 898; 1 Chit. 700.

In this country there has been diversity of decision upon the question whether private persons can sue out the writ to enforce the performance of a public duty, unless the non-performance of it works to them a special injury; and in several of the States it has been decided that they cannot. An application for a mandamus, not here a prerogative writ, has been supposed to have some analogy to a bill in equity for the restraint of a public nuisance. Yet, even in the supposed analogous case, a bill may be sustained to enjoin the obstruction of a public highway, when the injury complained of is common to the public at large, and only greater in degree to the complainants. It was in the Wheeling Bridge Case, 13 How. 518, where the wrong complained of was a public wrong, an obstruction to all navigation of the Ohio River.

The injury to the complainants in that case was no more peculiar to Pennsylvania than is the injury to Hall and Morse in this peculiar and special to them.

There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law-officer. People v. Collins, 19 Wend. 56; County of Pike v. The State, 11 Ill. 202; Ottawa

v. The People, 48 id. 233; Hamilton v. The State, 3 Ind. 452; Hall v. The People, 57 N. Y. 307; People v. Halsey, 37 id. 344; State v. The County Judge of Marshall, 7 Iowa, 186; State v. Railway, 33 N. J. Law, 110; Watts v. Carroll Parish, 11 La. Ann. 141. See also Dillon on Mun. Corp., sect. 695, and High on Ex. Rem., sections 431, 432; Cannon v. Janvier, 3 Houst. 27; State v. Rahway, 33 N. J. Law, 110. The principal reasons urged against the doctrine are, that the writ is prerogative in its nature, —a reason which is of no force in this country, and no longer in England, —and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is, that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted.

There is also, perhaps, a reasonable implication that Congress, when they authorized writs of mandamus to compel the Union Pacific Railroad Company to operate their road according to law, did not contemplate the intervention of the Attorney-General in all cases. The act of 1873 does not prescribe who shall move for the writ, while the Attorney-General is expressly directed to institute the necessary proceedings to secure the performance of other duties of the company. For these reasons we think the Circuit Court did not err in holding that Hall and Morse were competent to apply for the writ in this case.

The decree of the Circuit Court is affirmed. [Bradley, J., dissented; differing from the majority as to the eastern terminus of the railroad.]

NORTHERN PACIFIC R. CO. v. WASHINGTON TERRI-TORY ex rel. DUSTIN.

1892. 142 United States, 492.1

Error to the Supreme Court of the Territory of Washington.

Petition, in the name of the Territory of Washington, at the relation of the prosecuting attorney for the county of Yakima and four other counties, praying for a mandamus to compel the Northern Pacific R. Co. to erect and maintain a station at Yakima City, on its road; and to stop its trains there to receive and deliver freight, and to receive and let off passengers.

The company was incorporated by an Act of Congress, authorizing it to construct and maintain a railroad between certain points. By s. 5 of the charter it was enacted "that said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including

¹ Statement abridged from opinion. Portions of opinion omitted. - ED.

furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron; and a uniform gauge shall be established throughout the entire length of the road."

The petition set forth at length the size and importance of Yakima City and its need of railroad accommodations; alleged that it was the county seat of Yakima county, a county having more than 4000 inhabitants, and had a courthouse where courts of the United States and of the Territory were held, and a United States land office; that the defendant had refused to establish a freight and passenger station or to stop its trains at Yakima City, but was building a freight and passenger station and stopping its trains at the rival town of North Yakima, four miles further north, which it had laid out on its own unimproved land, and was ruining Yakima City for the purpose of enhancing the value of its own town site.

The answer, filed June 1, 1885, said nothing as to the courthouse; admitted that at the time of filing the petition there was a United States land office at Yakima City, but alleged that it had since been removed by order of the President of the United States to North Yakima; admitted that Yakima City heretofore had 500 inhabitants. but alleged that since the construction of the defendant's railroad twothirds of them had removed with their houses and other buildings to North Yakima, and others were continually abandoning it, and no buildings or business were replacing those taken away; denied that it had laid out the town of North Yakima for the purpose of enhancing the value of its own property, or for the purpose of injuring the property of any other person, town or city; and alleged that there was not business enough to warrant more than one station on this part of its road, and that North Yakima was a much larger and more prosperous town than Yakima City ever was, and was a more convenient point for the people of the neighboring valleys, who were more than fifteen times as many, and had more than fifteen times as much taxable property, as the people living in Yakima City and its immediate vicinity.

The parties also made allegations and denials, and (after the filing of a replication not copied in the record) introduced evidence at the trial by a jury, as to the matters afterwards stated in the special verdict, which was returned October 17, 1885, in answer to forty-six questions submitted by the court, and was in substance as follows:

In January, 1885, the defendant carried freight and passengers for hire on its railroad to and from Yakima City, and kept an agent there who attended to the freight and sold tickets to passengers. But before February 20, 1885, having completed its road to North Yakima, it ceased to stop its trains at Yakima City, and established a freight and passenger station at North Yakima; and pursuant to § 4 of its charter, tendered its road to the United States as fully completed and equipped from Pasco Junction to or beyond Yakima City, and caused

to be appointed by the President of the United States commissioners to examine and report on the condition of the road. On March 16, 1885, that part of its road from Pasco Junction by Yakima City to North Yakima had not been turned over to the operating department of the company, but the freight and passenger trains were not run as subordinate to the construction of the road.

In January, 1885, Yakima City was the oldest and largest town, and the most important business centre, on the Cascade Branch of the defendant's railroad, between the Columbia River and Puget Sound. On February 20, 1885, and when the defendant built and operated its road to Yakima City, the amount of business done at Yakima City annually was \$250,000, its population was 500, and there was no other town or business centre of any importance in Yakima County.

On October 17, 1885, Yakima City was the largest town, and the most important business centre in the county, except the town of North Yakima; the population of Yakima City was 150; there were seventy children attending school there; and it had two hotels, a flour mill, thirteen stores and places of business, twenty-seven dwelling-houses and but a limited amount of industries requiring railroad facilities. The amount of business furnished by Yakima City to the defendant over that portion of its road between Pasco Junction and North Yakima in the summer of 1885 was in June 16,000 lbs., in July 4000 lbs., in August none, in September 2400 lbs., in October none; and during that period no product of Yakima City or the country adjoining was furnished by any one to be carried over the defendant's road.

There is a safe and suitable place for a freight and passenger station in Yakima City on the line of the defendant's road and the defendant has the ability to construct and maintain such a station there, with freight and passenger facilities. If the defendant had done so, Yakima City would have retained its former size and importance. No demand was ever made upon the defendant for the establishment of a freight and passenger station there. The expense of constructing and fitting for practical use a station and warehouse at Yakima City would be about \$8000, and of keeping the requisite agents there \$150 a month. The wear and tear and cost of stopping a train at a station is \$1)

The passenger and freight traffic of the people living in the valleys of the streams entering the Yakima River at and near Yakima City and North Yakima, considering them as a community, would be better accommodated at North Yakima than at Yakima City. There are other stations for receiving freight and passengers on that part of the defendant's railroad, extending from Pasco Junction to North Yakima, called Yakima Division, furnishing sufficient facilities for all the country below North Yakima, and the earnings of that division are not sufficient to pay its running expenses.

On the verdict of the jury and the admissions in the pleadings, each

party moved for judgment; and on April 23, 1886, the District Court ordered a peremptory mandamus to issue, in accordance with the prayer of the petition. The record showed that the District Court during the previous proceedings in the case was held at Yakima City, but at the time of rendering judgment was held at North Yakima, to which the county seat and the courthouse had been removed pursuant to the statute of the Territory of January 9, 1886. Laws of Washington Territory of 1885-6, pp. 57, 457. On appeal to the Supreme Court of the Territory, the judgment of the District Court was affirmed. 3 Wash. Terr. 303. The defendant thereupon sued out this writ of error. . . .

A. H. Garland, for plaintiff in error (James McNaught, and H. J. May with him).

No appearance for defendant in error.

GRAY, J. A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its

part to do that act, and clear proof of a breach of that duty.

If, as in Union Pacific Railroad v. Hall, 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide water (as was held to be the case in State v. Hartford & New Haven Railroad, 29 Conn. 538), and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. New Orleans etc. Railway v. Mississippi, 112 U. S. 12; People v. Boston & Albany Railroad, 70 N. Y. 569.

But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point, when it would not be remunerative. York & North Midland Railway v. The Queen, 1 El. & Bl. 858; Great Western Railway v. The Queen, 1 El. & Bl. 874; Commonwealth v. Fitchburg Railroad, 12 Gray, 180; State v. Southern Minnesota Railroad, 18 Minnesota, 40.

The difficulties in the way of issuing a mandamus, to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself, are much increased when it is sought to compel the corporation to establish or to maintain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another,

which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards entrusted by the legislature with that duty, than by the ordinary judicial tribunals.

The defendant's charter, after authorizing and empowering it to locate, construct, and maintain a continuous railroad "by the most eligible route, as shall be determined by said company," within limits described in the broadest way, both as to the terminal points and as to the course and direction of the road; and vesting it with "all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth;" enacts that the road "shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances." The words last quoted are but a general expression of what would be otherwise implied by law, and cover all structures of every kind needed for the completion and maintenance of the railroad. They cannot be construed as imposing any specific duty, or as controlling the discretion in these respects of a corporation entrusted with such large discretionary powers upon the more important questions of the course and the termini of its road. The contrast between these general words and the specific requirements, which follow in the same section, that the rails shall be manufactured from American iron, and that "a uniform gauge shall be established throughout the entire length of the road" is significant.

To hold that the directors of this corporation, in determining the number, place and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases.

[The learned judge then cited and commented upon various cases; some of which are here abridged as follows:

Atchison, T. & S. F. R. v. Denver & New Orleans R., 110 U. S. 667. The constitution of Colorado provided that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad;" also that there should be no unreasonable discrimination in facilities for transportation. The court held, that the above constitutional right to connect railroads was confined to their connection as physical structures, and did not imply a connection of business with business; and that neither the common law, nor the constitution and statutes of Colorado, compelled one railroad corporation to establish a station or to stop its cars at its junction with the railroad of another corporation, although it had established a union station with the connecting railroad of a third corporation, and had made provisions for the transaction there of a joint business with that corporation. Waite, C. J., said that, as a general rule, remedies

for injustice of this kind could only be obtained from the legislature.

People v. New York, L. E. & W. R., 104 New York, 58. The court refused to grant a mandamus to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1200 inhabitants, and furnishing to the defendant at its station therein a large freight and passenger business; although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the state, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. (Under the statutes of New York the so-called adjudications of the railroad commissioners had no effect save by way of advice or suggestion, and could not be judicially enforced.) Dan-FORTH, J., said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus."

Com. v. Eastern R. R., 103 Mass. 254. The court held, that a rail-road corporation, whose charter was subject to amendment, alteration, or repeal at the pleasure of the legislature, might be required by a subsequent statute to construct a station and stop its trains at a particular place on its road.

State v. Republican Valley R. R., 17 Nebraska, 647. The decision proceeded upon the theory that, independently of any statute requirements, a railroad corporation might be compelled to establish a station and to stop its trains at any point on the line of its road at which the court thought it reasonable that it should.]

The leading facts of this case, then, as appearing by the special verdict, taken in connection with the admissions, express or implied, in the answer, are as follows: The defendant at one time stopped its trains at Yakima City, but never built a station there, and, after completing its road four miles further to North Yakima, established a freight and passenger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of filing the petition for mandamus was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. No other specific facts as

to North Yakima are admitted by the parties or found by the jury. The defendant could build a station at Yakima City, but the cost of building one would be \$8000, and the expense of maintaining it \$150 a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay its running expenses. The special verdict includes an express finding (which appears to us to be of pure matter of fact, inferred from various circumstances, some of which are evidently not specifically found, and to be in no sense, as assumed by the court below, a conclusion of law) that there are other stations for receiving freight and passengers between North Yakima and Pasco Junction, which furnish sufficient facilities for the country south of North Yakima, which must include Yakima City; as well as an equally explicit finding (which appears to have been wholly disregarded by the court below) that the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. It also appears of record that, after the verdict and before the District Court awarded the writ of mandamus, the county seat was removed, pursuant to an act of the territorial legislature, from Yakima City to North Yakima.

The mandamus prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the Territory at the relation of its prosecuting attorney; Attorney General v. Boston, 123 Mass. 460, 479; Code of Washington Territory, § 2171; and no demand upon the defendant was necessary before applying for the writ. Commonwealth v. Allegheny Commissioners, 37 Penn. St. 237; State v. Board of Finance, 9 Vroom, 259; Mottu v. Primrose, 23 Maryland, 482; Attorney General v. Boston, 123 Mass. 460, 477.

But upon the facts found and admitted no sufficient case is made for a writ of mandamus, even if the court could under any circumstances issue such a writ for the purpose set forth in the petition. The fraudulent and wrongful intent, charged against the defendant in the petition, is denied in the answer, and is not found by the jury. The fact that the town of North Yakima was laid out by the defendant on its own land cannot impair the right of the inhabitants of that town, whenever they settled there, or of the people of the surrounding country, to reasonable access to the railroad. No ground is shown for requiring the defendant to maintain stations both at Yakima City and at North Yakima; there are other stations furnishing sufficient facilities for the whole country from North Yakima southward to Pasco Junction; the earnings of the division of the defendant's road between those points are insufficient to pay its running expenses; and to order the station to be removed from North Yakima to Yakima City would inconvenience a much larger part of the public than it would benefit, even at the time of the return of the verdict. And, before judgment in the District Court, the legislature, recognizing that the public interest required it, made North Yakima the county seat. The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in Great Western Railway v. The Queen, already cited, "there is a very great difference between an indictment for not fulfilling a public duty, and a mandamus commanding the party liable to fulfil it." 1 El. & Bl. 878. The court will never order a railroad station to be built or maintained contrary to the public interest. Texas & Pacific Railway v. Marshall, 136 U. S. 393.

For the reasons above stated, the judgment of the Supreme Court of the Territory must be reversed, and the case remanded, with directions to enter judgment for the defendant dismissing the petition; and Washington having been admitted into the Union as a State by act of Congress passed while this writ of error was pending in this court, the mandate will be directed, as the nature of the case requires, to the Supreme Court of the State of Washington. Act of February 22, 1889, c. 180, §§ 22, 23; 25 Stat. 682, 683.

Judgment reversed, and mandate accordingly.

Mr. Justice Brewer, with whom concurred Mr. Justice Field and Mr. JUSTICE HARLAN, dissenting.

I dissent from the opinion and judgment in this case.

The question is not whether a railroad company can be compelled to build a depot and stop its trains at any place where are gathered two or three homes and families; nor whether courts can determine at what locality in a city or town the depot shall be placed; nor even whether, when there are two villages contiguous, the courts may determine at which of the two the company shall make its stopping place, or compel depots at both. But the case here presented is this: A railroad company builds its road into a county, finds the county seat already established and inhabited, the largest and most prosperous town in the county, and along the line of its road for many miles. builds its road to and through that county seat; there is no reason of a public nature why that should not be made a stopping place. For some reason, undisclosed, perhaps because that county seat will not pay to the managers a bonus, or because they seek a real estate speculation in establishing a new town, it locates its depot on the site of a "paper" town the title to which it holds, contiguous to this established county seat; stops only at the one, and refuses to stop at the other; and thus, for private interests, builds up a new place at the expense of the old; and for this subservience of its public duty to its private interests. we are told that there is in the courts no redress; and this because Congress in chartering this Northern Pacific road did not name Yakima City as a stopping place, and has not in terms delegated to the courts the power to interfere in the matter.

A railroad corporation has a public duty to perform, as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the State of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but in the absence of a specific direction from the legislature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts.

